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No. 690

In the

Supreme Court of the United States

OCTOBER TERM, 196

G. C. NUNN, *Receiver*, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS and MYRTLE BALLIS,
Petitioners,

v.

R. L. FELTINTON, LYDIA M. FELTINTON, SAMUEL C. LURIE, JOSEPHINE M. LURIE, WILLIAM L. LURIE, individually and as Trustee, and RITA M. LURIE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, G. C. NUNN, Receiver, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS and MYRTLE BALLIS, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on December 12, 1961.

A

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals (Rec. 345-363) is not yet reported; it is attached as Appendix "A". The judgment of said Court is attached as Appendix "C"

The judgment and decree of the District Court for the Western District of Texas denying plaintiffs' motion to remand is dated January 25, 1960 (Rec. 59) and the final decree is dated November 17, 1960 (Rec. 176). There was no opinion by the Judge of the District Court and none has been reported.

B

JURISDICTION

The opinion of the United States Court of Appeals was delivered on September 15, 1961 (Appendix "A"); extension in time to file Rehearing was granted on October 9, 1961 (Appendix "B"); Rehearing was denied and judgment rendered December 12, 1961 (Appendix "C").

By order entered January 5, 1962, the mandate has been stayed provided that within thirty days from that date there should be filed the certificate of the Clerk of the United States Supreme Court that this petition and the record have been filed in that Court. (Appendix D.)

The jurisdiction of this Court is invoked under *Subdivision (1), Section 1254, Title 28, United States Code*, and *Subdivision (b), Section 1, Rule 19, Supreme Court Rules*, because

the Court of Appeals has decided important questions of State or territorial law in a way in conflict with applicable statutes and decisions of the State, and has decided questions of Federal law in a way in conflict with decisions of this Court or another Court of Appeals, and has decided an important question of Federal law which has not been, but should be, settled by this Court. The case actually presents substantial Federal questions as to the jurisdiction of Federal Courts based on diversity of citizenship and substantial State and Federal questions as to whether Texas Courts have or may apply a policy under which Illinois statutes and proceedings not entitled to full faith and credit are voluntarily chosen or adopted as Texas law determining possession of Texas land.

C

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a suit by three Illinois plaintiffs and two Texas plaintiffs to obtain possession of Texas land from four Illinois defendants and two New York defendants, the matter in controversy is "between citizens of different states" and removable to the Federal Court because the Illinois plaintiffs were joined with a Texas Receiver with authority to represent them in the case.

2. Whether Texas Courts have or may invoke a policy or choice of law under which Texas Courts, although not required to do so by *Article IV, Section 1*, may voluntarily adopt and apply Illinois statutes and proceedings in determining the right to possession of Texas land; and whether

the voluntary adoption of the law of a State having no power to act or interest in the subject matter deprives Petitioners of due process, equal protection and equal privileges and immunities of Texas law, guaranteed by *Amendments, Article XIV, Section 1.*

D

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

On the question as to the jurisdiction of United States Courts based on diversity of citizenship, the provisions involved are *Article III, Section 2, United States Constitution; Section 1332, Title 28, United States Code;* and *Section 1441, Title 28, United States Code,* providing jurisdiction in and removal to United States Courts of actions in which the matter in controversy is between "citizens of different states."

As to the Constitutional effect of the voluntary choice by Texas Courts of Illinois law and proceedings to determine possession of land in Texas, the provisions of the United States Constitution involved in this case are—

> *Amendments, Article X,* reserving to the States, respectively, or to the people, all governmental power not conferred on the United States, thus leaving in each State the exclusive control of land in its territory;
>
> *Article IV, Section 1,* requiring full faith and credit to the public acts and judicial proceedings of the several States;
>
> *Amendments, Article XIV, Section 1,* prohibiting any State from denying any person the due process or equal protection of its laws or abridging the privileges and immunities of the citizens of the United States;

Article IV, Section 2, granting to citizens of each State the privileges and immunities of the citizens of the several States.

Article VI, making the Constitution the supreme law of the land.

E

STATEMENT

Petitioners brought suit in Cause No. 2478 in the District Court of Pecos County, Texas, 112th Judicial District, (Rec. 23-28), alleging the residence of the parties as follows:

Plaintiffs	*Defendants*
G. C. Nunn, a resident of Texas acting as Receiver under appointment of that Court in another cause, being No. 2458.	William L. Lurie, individually and as Trustee, and Rita M. Lurie, residents of New York.
Horace Smith, a resident of Texas.	
Fred Nemerovski, Harry Ballis and Myrtle Ballis, all residents of Illinois.	Robert L. Feltinton, Lydia M. Feltinton, Samuel C. Lurie and Josephine M. Lurie, all residents of Illinois.

The plaintiffs stated and proved without dispute that the West Side Trust and Savings Bank of Chicago, Illinois had the Texas land and transferred it by deed but reserved a portion of the mineral substances in and under the land and the possession or right to possession for the purpose of obtaining these mineral substances. Plaintiffs stated and proved without dispute that the Bank had been dissolved and showed that its right to possession had passed to plaintiffs and the

other former stockholders of the Bank under Texas law. Some of the former stockholders or their successors applied to a Texas Court for the appointment of a Receiver to manage, control and distribute these mineral substances. To protect and preserve the rights of all interested parties, both present and absent, known and unknown, the Texas Court appointed a Receiver and authorized suit to establish and obtain possession of the Texas land for mineral purposes.

The case was removed to the United States District Court for the Western District of Texas, Pecos Division, by a petition alleging jurisdiction based on diversity of citizenship. (Rec. 16-50.) Motion to remand was duly made (Rec. 51-57) and overruled, (Rec. 59), which ruling was and is specified as error.

As to this, the Court of Appeals held that the Illinois plaintiffs were formal or unnecessary parties because a Texas Receiver had authority to represent their interests, and that the matter in controversy was between citizens of different states, even though Illinois plaintiffs and Illinois defendants were propertly before the Court asserting directly their conflicting claims to possession of the Texas land, which conflicting claims were actually adjudicated between Illinois plaintiffs and Illinois defendants. (Appendix "A", Page 39).

2.

The facts as to the conflicting claims are largely undisputed and are stated in the opinion at Appendix "A".

Texas recognizes the ownership in place of mineral substances in and under its lands with the right to use so much of

the land as necessary to obtain the minerals. In this case, as in others, a substantial period of time elapsed between creation of the mineral right and the actual discovery of the minerals. During this interval, the Bank was dissolved and the present case involves a dispute as to the lawful succession to its ownership and right to possession of the Texas land for mineral purposes. See *Humble Oil & Refining Company v. Blankenburg*, 149 Texas 489, 235 S. W. 2d 981.

Both parties filed motions for summary judgment. The plaintiffs' motion showed an unbroken succession from and under the State of Texas to the Bank, the dissolution of the Bank, and that the plaintiffs were the owners or representatives of the interests of all of the shareholders of the Bank, and plaintiffs showed that applying Texas law to these facts, they were entitled to the possession of the mineral rights.

Defendants' motion and exhibits showed that the Chicago Bank had become insolvent; that an Illinois statute provided for dissolution and a receivership in that event; that such proceedings were had, at the conclusion of which there was executed a general transfer or assignment of all of the Bank's unknown or unlisted assets, and defendants argued that by applying the Illinois statute and enforcing the proceedings, they were the lawful successors to the Bank's right to the possession of the Texas minerals.

The District Court refused and denied plaintiffs' motion for summary judgment, granted and sustained defendants' motion, and entered a decree that plaintiffs take nothing by their suit (Rec. 176). The Court of Appeals affirmed the

action of the District Court, holding that regardless of whether the Illinois statute and receivership proceedings are entitled to full faith and credit, the Texas Courts have and will apply a policy by which they voluntarily recognize and adopt the Illinois statute and proceeding under it under the circumstances of this case. Petitioners deny that such policy exists and state that if it does, it adopts as part of the law of Texas a statute of Illinois, and proceedings under that statute, although Illinois has no power or control over Texas land, and its proceedings are not entitled to full faith and credit, and that such a choice of law violates Petitioners' rights under the *Fourteenth Amendment*, as well as *Article IV, Section 2.*

F

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Court of Appeals has held that the matter in controversy is between citizens of different States because some of the plaintiffs were unnecessary parties, and has thus decided a Federal question in a way in conflict with applicable decisions of this Court and the decision of another Court of Appeals on the same matter.

The Court of Appeals has held that the Illinois plaintiffs who asserted directly a claim to the possession and use of the land were not necessary parties plaintiff to the suit, or were formal parties, so that the controversy was solely between citizens of different States. This holding is stated as follows:

> "The pertinent statutes and decrees governing the present receivership have already beeen set forth. *in*

extenso. From a mere reading of them it clearly appears that Nunn was a general receiver, vested not only with possession but with control of the title and authority to sue, representing, by order of the appointing court, the entire interest claimed by the shareholders and all rights of action in respect to it. We conclude that the three Illinois stockholders were mere formal or unnecessary parties, and that their joinder does not prevent the removal of the action nor defeat federal jurisdiction."

This case was brought into the Federal Court by removal under the provisions of *Section 1441, Title 28, United States Code*, which permits removal of cases within the original jurisdiction of the Federal Courts. The original jurisdiction of the Federal Courts is prescribed in *Section 1332, Title 28, United States Code*, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different states;"

The case of *Strawbridge v. Curtiss, 3 Cranch 267, 2 Law Ed. 435*, deals with a case in which several plaintiffs assert claims against several defendants, and it requires that each plaintiff be able to sue each defendant in the Federal Court, that is, all plaintiffs must be citizens of different States from all defendants; this requirement applies to parties of all classes, indispensable, conditionally necessary, and proper parties. *Moore's Federal Practice, Volume 1, Page 644, 645.*

It was proper for the Illinois plaintiffs to join with the Receiver in asserting a claim in which they had a joint and direct interest. *Rule 40, Texas Rules of Civil Procedure*, permits parties jointly interested in a claim to bring a single

suit in which all participate, and the same provision is made in *Rule 20, Federal Rules of Civil Procedure*, from which the Texas Rule was taken.

At no place in this proceeding has there been any plea or contention that the Illinois plaintiffs were not properly joined; no plea of misjoinder has been made, no request has been made or action taken to dismiss, drop or eliminate the Illinois plaintiffs from the case. The Illinois plaintiffs in their pleadings asserted personally and directly an interest in the subject matter and a claim for relief; they offered proofs to support their claims; the Court actually adjudicated the merits of their claim against them directly and personally by entering a judgment that plaintiffs "take nothing" by their suit. The decree so entered resembles closely that made by the District Court in *American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534*, and which decree has the affirmative effect of vesting in the defendants the title and possession that the plaintiff then has or claims. *41-A, Texas Jurisprudence, Page 758.* The *Finn* case holds that the Federal District Courts have no jurisdiction to enter such a decree in a controversy between citizens of the same State, even though some of them are not necessary parties to the case. The *Judicial Code* does not authorize the Federal District Courts to hear and determine controversies between plaintiffs and defendants who are citizens of the same State: the circumstance that some of the plaintiffs or defendants are not necessary parties does not authorize a determination of a controversy between citizens of the same State, as the District Court has done. ***Moore's Federal Practice, Volume 1, Page 644, 645.***

The *Judicial Code* speaks of *actions* (plaintiffs v. defendants) as separate and disitinct from the *controversy* arising in the action. *Section 1332, Title 28, United States Code; American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534.*

The Court of Appeals has cited *Barney v. Latham, 103 U. S. 205, 26 Law Ed. 514 (1880); Chesapeake & Ohio Railway Company v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278; Morris v. E. I. duPont deNemours & Co., 68 Fed. 2d 788, 791;* and *Salem Trust Company v. Manufacturers' Finance Company, 264 U. S. 182, 44 Sup. Ct. 266.* In each of these cases, the parties and controversy were as follows:

Plaintiff	*Defendant*
(State A)	(State B)
	(State A)
	Defendant

None of these cases holds that a Federal District Court may adjudicate the merits of a controversy between plaintiffs and defendants who are citizens of the same State upon the ground that some of the *plaintiffs* were not necessary parties.

All of these cases were decided at a time when the *Judicial Code* conferred a special right of removal where there was a "separable controversy" between the plaintiff and the removing non-resident defendant. In each of these cases the *controversy* between the plaintiffs and the removing defendant was between citizens of different States, and the resident co-defendant was not a necessary party to this controversy. In some of the cases, the resident defendant was fraudulently

or collusively joined for the purpose of preventing removal. All of these cases simply apply the language of the *Judicial Code* as it then stood and hold that the controversy between the plaintiff or plaintiffs and the removing defendant was separable and was between citizens of different States.

Lee v. Lehigh Valley Coal Co., 267 U. S. 542, 45 Sup. Ct. 385, merely expresses doubt as to whether a plaintiff can invoke this rule in other words, whether a plaintiff can sue a non-resident defendant and a resident defendant *in the Federal Court* and sustain Federal jurisdiction on the ground that a defendant voluntarily joined by him is unnecessary to the case.

In 1948 the *Judicial Code* was amended to eliminate removal in cases where there was a "sparable controversy" and provide removal only where there was a "separate and independent cause of action." *Section 1441 (c), Title 28, United States Code. American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534*, is identical on the facts with the above cases, but holds that because of the change in the *Code*, removal is no longer permitted; thus these cases which the Court of Appeals cites are no longer applicable, even on these facts. Regardless of this, the controversies in this case are as follows:

Texas	Illinois
Texas	Illinois
Illinois	New York
Illinois	

This does not present a controversy between citizens of the different States even under the repealed Code provisions.

The Court also cites *New Orleans v. Gaine's, Administrator, 138 U. S. 595; Mexican Central Ry. Co. v. Eckman, 188 U. S. 429,* and *Fallat v. Gouran, 220 Fed. 2d 325.* In each of these cases the controversies were as follows:

Plaintiff, as guardian or administrator	*Defendant*
(State A)	(State B)

In all of these cases the only plaintiff before the Court was the legal representative and the controversy between the legal representative and the defendants was between citizens of different States. In this case the controversy is as follows:

G. C. Nunn, Receiver for all claimants (Texas).	R. L. Feltinton and Lydia M. Feltinton (Illinois).
Horace Smith (Texas). Fred Nemerovski (Illionis).	Samuel C. Lurie and Josephine M. Lurie (Illinois).
Harry Ballis and Myrtle Ballis (Illinois).	William L. Lurie and Rita M. Lurie (New York).

Mexican Central Ry. Co. v. Eckman, 188 U. S. 429, states and recognizes that had the minor joined in the suit in his own name, or through a next friend, the controversy would be between citizens of the same State, and not within Federal diversity jurisdiction.

Second National Bank v. New York Silk Manufacturing Company, 11 Fed. 532; Bates v. New Orleans BR&VR Company, 16 Fed. 294; and *Banigan v. Worcester, 30 Fed. 392,* involved joint action by or against a legal representative

(Trustee or Receiver) and the beneficiaries of the trust or receivership, and in each of those cases it was held that the controversy was not between citizens of different States where some of the ficiarieis had the same citizenship as the opposing parties. In *Smith v. Sperling, 354 U. S. 91, 77 Supp. Ct. 1112*, certain stockholders acting as representatives asserted a derivative claim for and on behalf of the corporation, and for its benefit. This Court held that with the beneficiary properly in the case and properly aligned opposite citizens of the same State, the case was not within Federal diversity jurisdiction, even though the stockholders could have asserted the cause of action without the presence of the corporation.

The controversy in this case is whether the former stockholders of the Bank are entitled to establish and recover the possession, use and occupancy of the land for the exercise of their rights. Citizens of the same State were on opposite sides of this controversy on the face of the pleadings, as developed by the proofs, and as adjudicated in the decree. The presence in the case of a legal representative still leaves citizens of the same State as substantial opponents in this controversy, and since they were, the case is not within the original jurisdiction of the Federal Courts and was improvidently removed, based on diversity of citizenship. The Court of Appeals holding to the contrary conflicts with *Strawbridge v. Curtiss, 3 Cranch 267, 2 L. Ed. 435; American Fire & Casualty Company v. Finn, 341 U. S. 6, 71 Sup. Ct. 534;* and *Smith v. Sperling, 354 U. S. 91, 77 Sup. Ct. 1112.*

2. In actions for possession of land, the State Courts are required to apply the law of the State where the land is unless the State law is displaced by an act or proceeding entitled to full faith and credit under Article IV, Section 1; the voluntary adoption and application of the statutes and proceedings of Illinois deprives Petitioners of due process, equal protection and equal privileges under Amendments, Article XIV, Section 1, and Article IV, Section 2. In holding to the contrary, the Court of Appeals has decided important questions of State or territorial law in conflict with applicable statutes and decisions of Texas, and has decided Federal questions in conflict with applicable decisions of this Court and its decisions on the same matter, and has decided important Federal questions which have not been, but should be, settled by this Court.

Petitioners were plaintiffs in the District Court and there established without dispute that they were the successors to and representatives of the interests of all of the shareholders of this Bank. The District Court and Court of Appeals are required, in diversity cases, to apply the statutes and decisions of Texas. *Section 1652, Title 28, United States Code.* Applying only Texas statutes and decisions, plaintiffs, as shareholders of the dissolved corporation, are entitled as its successors to recover the possession of the Texas land. *Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 891; Courseview, Inc. v. Phillips Petroleum Company, 158 Texas 397, 312 S. W. 2d 197.*

The District Court refused plaintiffs' claim for possession and the Court of Appeals affirmed that judgment, but

did not base its judgment on Texas statutes and decisions. The Court of Appeals invoked a statute of the State of Illinois and certain proceedings under that statute, and based its judgment on these (Rec. 356).

Texas has the exclusive physical power to control or confer possession of Texas land and under the authorities cited below, the Texas Courts are not required by *Article IV, Section 1*, to give full faith and credit to Illinois statutes and proceedings which attempt to confer possession of land in Texas. The Court of Appeals holds that, notwithstanding this, the Courts of Texas will voluntarily apply the Illinois statute and voluntarily enforce the proceedings under that statute, and holds and states as follows:

> "It is not necessary to decide whether Article IV, Section 1 of the Constitution of the United States and Section 1738 of Title 28, United States Code, require that Texas courts give full faith and credit to the Illinois statute under which title was vested by the Auditor in the Illinois Receiver, for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver upon the principles of comity." *McElreath v. McElreath, Tex., 1961, 345 S. W. 2d 722, 725.*

As to this holding, Petitioners bring this complaint—

(a) In holding that Texas Courts may refer to and apply statutes and decisions of other States in determining possession of Texas land, and that Texas statutes and decisions are not exclusive on this matter, the Court of Appeals has decided an important question of State law in conflict with.

State decisions and its own decisions. *Colden v. Alexander, 141 Texas 134, 171 S.W. 2d 328; Teas v. Kimball, 257 Fed. 2d 817.* In so holding, the Court of Appeals has decided a question of Federal Constitutional law in conflict with decisions of this Court. *United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287; United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Green v. Biddle, 8 Wheat 1, 5 L. Ed. 547; Clark v. Graham, 6 Wheat 577, 5 L. Ed. 334; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Brine v. Hartford Fire Insurance Company, 96 U. S. 627, 24 L. Ed. 868; McCormick v. Sullivant, 10 Wheat 202; McGoon v. Scales, 9 Wall 23, 19 L. Ed. 545; Runyan v. Coster, 14 Peters 122.*

(b) In holding that Texas Courts may apply or adopt the receivership statutes and proceedings of other States and that Texas law on this matter is not exclusive, the Court of Appeals has decided an important question of State law contrary to the statutes and decisions of Texas. *Title 42, Chapter 13, Articles 2293-2320, Revised Civil Statutes of Texas, 1925; Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599; Evans v. Ropte, 128 Texas 75, 96 S. W. 2d 973; Moseby v. Burrow, 52 Texas 396; Barnett v. Poole, 23 Texas 518.* In so holding, the Court of Appeals has also decided a Federal Constitutional question contrary to decisions of this Court in *Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451.*

(c) In holding that Texas Courts, bound by exclusive State law, may apply a statute or proceeding of another

State which is not entitled to full faith and credit, the Court of Appeals has decided an important Federal question contrary to prior decisions of this Court. *Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Pacific Employers Insurance Company v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629.*

(d) In holding that Texas Courts may voluntarily apply, as to Texas land, Illinois statutes and proceedings which are not entitled to full faith and credit, the Court of Appeals has announced a rule or choice of law which denies Petitioners due process and equal protection under the *Fourteenth Amendment* because the Texas Courts must apply Texas law unless required to give full faith and credit to the Illinois statute and proceeding. The Texas Courts are not authorized to apply the Illinois statutes and proceedings to Texas land by Texas law, nor by the Federal Constitution, and the judgment made with reference to the Illinois statutes and proceedings is not based on anything which is law, but is based on the Court's knowledge of the existence of something which is not law, and this is a denial of due process and equal protection. This is an important Federal question which has not been, but should be, settled by this Court in its specific application to possession of land. This Court has, in prior decisions, recognized and stated that the application of the law of a State which has no power over or governmental interest in the subject of the controversy is a denial of due process. *Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Pacific Employers Insurance Company v. In-*

dustrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629; Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.

The Court of Appeals decision is contrary to the statements, holdings and decisions of this Court in these cases.

Wherefore, Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit and in support of said petition, submit arguments and authorities as follows:

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

In diversity cases, the United States Courts are bound by the State statutes and rules of decision *(Section 1652; Title 28, United States Code)*, and function as State Courts, and will be referred to as such in this Petition.

To such State Courts, plaintiffs presented pleadings and proof showing that as the shareholders, or representatives of shareholders, of a dissolved corporation they had the right to possession of land belonging to such dissolved corporation under Texas decisions, are granting the right to possession of its lands, including mineral rights, based on the same and identical proof as that offered by these plaintiffs. *Baldwin v. Johnson, 95 Texas 85, 65 S. W. 171; Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 981;*

Courseview, Inc. v. Phillips Petroleum Company, 158 Texas 397, 312 S. W. 2d 197.

In opposition to plaintiffs' claim, the defendants offered—

(a) A statute of the State of Illinois, and

(b) Certain proceedings had in Illinois Courts under and pursuant to this statute.

The Illinois receivership proceeding, standing alone and unaided by the Illinois statute, is an unenforceable nullity as to Texas land. It is a usual insolvency receivership proceeding; after certain preliminary administrative steps (Rec. 11, 195), a complaint was filed by and in the name of the State of Illinois in one of its Courts (Rec. 182-194), and after summons was served, a decree was entered (Rec. 196-202), in which the Court found that a Receiver had been designated and appointed by the State Auditor, and had taken the possession of, and for purposes of receivership, the title to, the books, records and assets of every description of the Bank (Rec. 189). Thereafter, a successor Receiver applied to the Illinois Court for permission and power to sell the remaining assets of the Bank (Rec. 203-207), permission and power were granted, and a sale was held which did not describe or refer to the Texas land (Rec. 214-248), but in which a general transfer of all unknown and unlisted assets was executed and delivered (Rec. 249).

It is uniformly held that the Courts of one State are without jurisdiction to confer on officials of that State the

power to control or transfer the possession of land located in another State, even though the owner is personally subject to the jurisdiction of the Court, and such decrees, and the transfers made pursuant to them, are unenforceable and void. *30-A, American Jurisprudence, Page 910; Morris v. Hand, 70 Texas 481, 8 S. W. 210; Barnett v. Poole, 23 Texas 418; Moseby v. Burrow, 52 Texas 396; Evans v. Ropte, 128 Texas 75, 96 S. W. 2d 973; Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599; Restatement, Conflict of Laws, Sections 48, 50, 223.*

Being void for lack of jurisdiction over the subject matter, full faith and credit is not required of such decrees or the attempted transfers made pursuant to them. *Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Morris v. Hand, 70 Texas 481, 8 S. W. 210.*

The Court of Appeals does not hold that the Illinois receivership proceeding, as such, is entitled to full faith and credit, nor does it hold that the Texas Courts will voluntarily recognize and enforce the receivership proceeding as such; an attempted voluntary recognition of the proceeding, without the statute, would result in a determination of plaintiffs' rights by and in a Court which had no jurisdiction to act on the subject matter; the Court's jurisdiction would not be supplied by its general findings in a proceeding which nowhere mentioned the Texas land *(Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134)* and an effort to bind these plaintiffs to a determination of their rights by and in a Court which had no jurisdiction of the subject

matter would deprive Petitioners of due process of law. *Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108.*

So the sole question is whether the Illinois statute is to be applied in this case in determining the right to possession of Texas land, and in displacing a receivership as to that land in a Texas Court, for unless the Illinois statute is made the basis for the determination of these matters, the proceeding is unenforceable, and no defense to plaintiffs' claim.

The Court of Appeals does not hold that the Illinois statute is entitled to full faith and credit under *Article IV, Section 1*, but holds that the Courts of Texas will, in this case, voluntarily recognize, apply and enforce the Illinois statute in a suit concerning the possession of land in Texas.

This holding, and the public policy on which it is based, deprives Petitioners of due process of law; the right of State Courts to apply the laws and statutes of other States to cases before them, is subject to known and definite Constitutional limitations; these Constitutional limitations arise in these situations—

(a) *The Court's power is limited by the law of the State in which the Court sits.* The Courts are branches of the government *(Stoll v. Gottlieb, 305 U. S. 165, 59 Sup. Ct. 134)*; the Courts do not make the law, or establish the policy, or create their own jurisdiction, but must apply the law as it is given to them by the State or nation of which they are a part. Where the State law is exclusive, no choice of law is permitted; the State has made the law, and has made it ex-

clusive, and the Courts of that State may not make it optional by the voluntary application of the law of other States; where the State law is exclusive, the application of a statute of another State cannot be determined by reference to the law of that State, but is to be applied only when full faith and credit requires it. *Pacific Employers Insurance Company v. Industrial Accident Commission, 306 U. S. 493, 59 Sup. Ct. 629.* For a State Court, bound by exclusive State law, and not required by full faith and credit, to apply in the Court's discretion the statute of another State deprives the litigant of due process; the plaintiff has a Constitutional right to have his case determined in a regular proceeding under the applicable law; the statute of another State is not the applicable law; it has not been enacted by the State in which the Court sits; the exclusive nature of the State law prevents its voluntary application by the Court; it is not made part of the law binding on the Court by the full faith and credit section; thus, statute is not part of the law which the Court is required or authorized to apply, and a decision of a case based on such statute is a decision, not based on law, but based on the Court's knowledge of the existence somewhere else of something which is not law, and this is not due process. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

(b) A State Court's power to apply the statutes of other States to cases before it is limited *by direct application of the due process section* of the *Fourteenth Amendment.* In those cases where the State law is not exclusive, and a choice

of law by the Courts is permitted, the State Court may apply the statute of another State only where such State has some power or control over, or governmental interest in, the subject matter of the case; the selection by a State Court of a statute of another State, and application of it to a case, where the enacting State has no power over or governmental interest in the subject of the litigation, is a capricious choice, and deprives the litigant of due process. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

Both of the above Constitutional limitations prevent the application of the illinois statute to this case.

1. *The Texas statutes and decisions are exclusive in determining the right to possession of Texas land, and the receivership proceedings in Texas Courts; the Illinois statutes and proceedings are not entitled to full faith and credit; the voluntary application by Texas Courts of the Illinois under these circumstances deprives Petitioners of due process.*

The exclusive control of the possession of land within its territory is one of the basic and fundamental powers reserved to the respective States by *Amendments, Article X*, and is claimed by Texas by reason of its existence as a State under the Constitution. *Texas Constitution, Article I, Section 1.* For this reason, the Texas statutes and decision are the sole body of law which Texas authorizes its Court to refer in

determining the right to possession of Texas land. *United States v. Crosby, 7 Cranch 115, 3 L. Ed. 287 (1812); United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Watkins v. Holman, 16 Peters 25, 10 L. Ed. 873; Green v. Biddle, 8 Wheat 1, 5 L. Ed. 547; Clark v. Graham, 6 Wheat 577, 5 L. Ed. 334; Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437; Brine v. Hartford Fire Insurance Company, 96 U. S. 627, 24 L. Ed. 868; McCormick v. Sullivant, 10 Wheat 202; McGoon v. Scales, 9 Wall 23, 19 L. Ed. 545; Runyan v. Coster, 14 Peters 122; Teas v. Kimball, 257 Fed. 2d 817; Colden v. Alexander, 141 Texas 134, 171 S. W. 2d 328.*

Texas has in effect a complete system of law pertaining to possession of land and a full procedural system for enforcing the right to possession of land. *Title 31, Articles 1288-1301, Revised Civil Statutes of Texas, 1925; Rules 783-809, Texas Rules of Civil Procedure.* These laws and rules must and do apply to all land, whether owned by residents or non-residents. *Title 42, Articles 1975-1976, Revised Civil Statutes of Texas, 1925; Rules 108, 109, 114-116, Texas Rules of Civil Procedure.*

Texas has in effect a complete statutory procedure for administering the affairs of dissolved corporations through a receivership. *Title 42, Chapter 13, Articles 2293-2320, Revised Civil Statutes of Texas, 1925.* Where the property consists of land or the right to possession of land, these statutes provide for a proceeding in the County where the land is located by a Receiver who is a resident of Texas and who acts under the control and jurisdiction of a Texas Court. The procedure so provided is by its nature and terms ex-

clusive. *Texas & Pacific Railway Company v. Gay, 86 Texas 571, 26 S. W. 599.*

No Texas statute authorizes the Judges applying Texas law to adopt, at their will and discretion, the law and statutes of other states in determining possession of land in Texas; such statute, if one existed, would not be a statute at all, but an ineffective delegation or abdication of the legislative function. *C.&A. RR Company v. Tranbarger, 238 U. S. 67, 35 Sup. Ct. 678.*

The statutes cited by the Court of Appeals are far removed from such an effort.

Article 489(b), Section 7, Texas Banking Act, provides in general terms that the Federal Deposit Insurance Corporation, an agency of the United States government *(Section 264(a), United States Code, Title 12)*, shall manage and control the property and assets of State banks insured by that corporation; *Article 1288, Revised Civil Statutes of Texas, 1925*, provides that the directors of dissolved corporations shall manage and control its properties; *Section 21.28, Texas Insurance Code*, contains express provisions requiring a Texas receivership for foreign corporations. In holding that Texas statutes are not exclusive as to possession of Texas land, and permit application of the law of other states, the Court of Appeals has decided an important question of state and Federal law in a way contrary to the applicable statutes and decisions of Texas, and the decisions of the Court cited above.

The Court of Appeals does not hold that the Illinois statute is entitled to full faith and credit so that the Texas Courts

are required to apply it, and under prior decisions of this Court, the Illinois statute is not entitled to full faith and credit under *Article IV, Section 1.*

The Illinois statute is a bankrupt or insolvency law; it is part of the general law of Illinois and prescribes the terms on which property, including land, is to be possessed in that State; such laws are limited to property within the territory of the state. *International Shoe Company v. Pinkus, 278 U. S. 261, 49 Sup. Ct. 108.* Full faith and credit to such statutes is not required in other states. *Olmstead v. Olmstead, 216 U. S. 386, 20 Sup. Ct. 292.*

Some corporate dissolution statutes confer on a Receiver or other official the personal capacity to represent the corporation to the extent necessary to preserve, protect and defend the rights of the dissolved corporation; the personal capacity so conferred is a status which is entitled to full faith and credit under *Article IV, Section 1,* and the Courts of other States must recognize the capacity of such Receiver or other official to appear in their proceedings for these purposes. *Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 337; Clarke v. Williard, 292 U. S. 112, 54 Sup. Ct. 615 (1934).* But the statutes themselves, insofar as they prescribe rules of procedure, jurisdiction or provide distribution, are beyond the scope of *Article IV, Section 1,* and full faith and credit is not required of those statutes for those purposes in the Courts of other States. *Clarke v. Williard, 294 U. S. 211, 55 Sup. Ct. 356 (1935); Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380; Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451.*

The statute operates as a law even though it is phrased in terms of "title". The Illinois statute contains a provision for conferring on the Receiver the possession of, and for purposes of the receivership, the title to, the property of the dissolved corporation. As to this, the Court of Appeals holds and states as follows:

> "The Bank's charter was a contract between the Bank, its shareholders, and the State of Illinois; and the Illinois statutes became a part of that contract. Those statutes provided for the appointment by the Auditor of the receiver as statutory liquidator; and on his appointment, the receiver succeeded to the Bank's title to its assets of every description."

Some state statutes require the insolvent debtor to execute an instrument surrendering the property to the administering official for disposition under the insolvency statute; other statutes make the statute a transfer by virtue of its own force; regardless of the mechanics, the provisions for transfer of possession and title to the state official for administration under its insolvency law are merely means for execution of the statute, and are part of it, and do not include property beyond the territory of the enacting state. *Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134; Security Trust Company v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545. Restatement, Conflict of Laws, Sec. 264.*

When the Court of Appeals then says—

> "That Texas has no policy against transfer of title by the law of the state of incorporation to the liquidator of an insolvent or dissolved corporation is shown by Texas statutes making like provisions for Texas corporations,"

and—

> "* * * for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver under the principles of comity. *McElreath v. McElreath, Tex., 1961, 345 S. W. 2d 722, 725.*"

it necessarily has adopted for purposes of this particular case a provision in a general statute of the State of Illinois and applied it to land in Texas as if it were part of the law of Texas; having adopted or applied the "title" provision which aids the enforcement of that law, the Court must and does adopt and apply all the remaining portions of the statute, including those which confer on the Illinois Court the power and jurisdiction to order a seizure and sale of land in Texas.

The law of Texas does not authorize Texas Courts to adopt, in their discretion, the Illinois statutes, but the exclusive nature of Texas law forbids Texas Courts to apply that of any other State; the full faith and credit section does not require the Texas Courts to apply the Illinois statutes, nor does the Illinois statute displace or supplant the laws of Texas under *Article IV, Section 1;* the Texas Courts have voluntarily applied the Illinois statute, and have done so without authority from the State of Texas, and without authority from the United States, and in so doing, have determined the plaintiffs' rights by reference to the statute books of other States, although the contents of those statute books have not been made part of the law of Texas by any governmental

authority, and this denies Petitioners due process of the Texas law which they are entitled to have applied to their case, but which has not been applied to their case. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission, 294 U. S. 532, 55 Sup. Ct. 518; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

2. *If a choice of law by Texas Courts were permitted, the voluntary selection of the Illinois statute is not based on any established power or control over the subject of the litigation, or governmental interest in it, and the choice so made denies Petitioners due process of law.*

Under the above authorities, Texas law is exclusive, both in determining the right to possession of Texas land and the conduct of receivership proceedings in Texas Courts; where the Texas law is displaced or supplanted by the law of another State due to the effect of *Article IV, Section 1*, the Texas Courts are bound by *Article V* to apply such law, Texas law to the contrary notwithstanding, and Texas Courts dutifully do so; but the Texas reports show no instance in which Texas Courts, bound by exclusive State law, have voluntarily applied the law of another State when not required to do so by *Article IV, Section 1.*

The Court of Appeals has taken *Carpenter v. Pink, 133 Tex. 82, 124 S. W. 2d 981*, in which a New York Receiver appeared in a Texas Court to contest the fees charged by the Texas Receiver and his attorney, as a voluntary recognition by Texas Courts of receivership proceedings in other states.

Texas has no statute authorizing Texas Courts to recognize Receivers from other states, but where a Receiver is duly authorized to protect and preserve the rights of a dissolved corporation, his capacity in other states must be recognized under the full faith and credit section. *Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 337; Clarke v. Williard, 292 U. S. 112, 54 Sup. Ct. 615 (1934).*

But this compulsory recognition pertains only to the *personal capacity* of the Receiver. Full faith and credit does not require enforcement of the law of another state or its proceedings under that law. *Clarke v. Williard, 294 U. S. 211, 55 Sup. Ct. 356 (1935); Morris v. Jones, 329 U. S. 545, 67 Sup. Ct. 451; Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380.*

The Court of Appeals has taken *McElreath v. McElreath, Texas 1961, 345 S. W. 2d 727,* in which an Oklahoma Court in a divorce case ordered the husband to exercise his personal power of conveyance as to land in Texas, as an example of voluntary recognition by Texas of the proceedings of other states which indirectly determine the possession of Texas land. The power of a court to order an owner to execute a deed conveying land in another state has long been recognized. *Watts v. Waddle, 6 Peters 389, 8 L. Ed. 437.* Such a decree is an order to the defendant, personally, to perform an act within the territory and jurisdiction of the Court, and is enforceable by the Court through its own processes and based on its own inherent jurisdiction, and such a decree is entitled to full faith and credit. *Currie, Full Faith and Credit to*

Foreign Land Decrees, 21 University of Chicago Law Review 620, Pages 648-657; Restatement, Conflict of Laws, Sec. 97.

This case was a *required* enforcement in Texas of a decree which is entitled to full faith and credit, not a voluntary adoption of Oklahoma law.

The only cited instance of a voluntary application or choice of the law of another State in determining possession of property is *Fischer v. American United Life Insurance Company, 314 U. S. 549, 62 Sup. Ct. 380.* The property there involved was *personal* property in the form of securities deposited with an Iowa official. An action to recover personal property is a transitory action; such personal property is not subject to an exclusive jurisdiction. *Restatement, Conflict of Laws, Sections 50-53.* The Iowa Courts may well have a choice as to whether to apply the Michigan law where the owner resided or the Iowa law where the property was situated, and might apply either, depending on Iowa's policy. See *Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Restatement, Conflict of Laws, Sec. 53.*

But this case is a real action, involving a fixed and immovable object as to which Texas law is and must be exclusive, and these decisions furnish no instance in which the Courts of Texas have voluntarily applied the statutes of other States to Texas land, nor any instance in which this Court has permitted them to do so.

Even in transitory actions, where the law of more than one State may apply, and a choice of law is permitted, the power and authority of State Courts to choose the applicable law

is limited by the due process and equal protection provision of the *Fourteenth Amendment;* the choice so made must be based on some known or established governmental power or interest in the subject of the litigation; a choice not based on these considerations is capriciously made and deprives the litigant of his Constitutional right to have his case determined under the applicable law. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review.*

The reasons given for applying the Illinois law are that the Bank was incorporated in Illinois and the rights of Texas creditors are not involved in the case. The constitution condemns State laws or policies which discriminate against citizens or corporations due to their residence. *Travis v. Yale & Towne Manufacturing Company, 252 U. S. 60, 40 Sup. Ct. 228.* Petitioners' right to possession does not depend on whether they have any creditors or whether the creditors have been paid. *Humble Oil & Refining Company v. Blankenburg, 149 Texas 489, 235 S. W. 2d 981.* Texas receivership proceedings must be made available for all shareholders, regardless of their residence. *Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165.* Texas receivership statutes provide an administration in the locality where the land is situated by a Receiver who is a Texas resident under control of Texas Courts after a notice specifically describing the subject of the receivership. *Title 42, Chapter 13, Sections 2293-2320, Revised Civil Statutes of Texas, 1925.* These are available safe-

guards to a land owner against an improvident disposition of his rights; the exhibits in this case show that the administration under the Texas receivership statutes will yield a surplus for the shareholders. By denying Petitioners possession because of a voluntary application of an Illinois law and proceeding, the Courts have denied Petitioners the equal protection of Texas law, due solely to their residence or citizenship in Illinois, and this is not permissible. *Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165.*

The subject of this case is the possession of Texas land, and Illinois has no control over or concern with which person possesses Texas land. The subject of this case is the application of the Texas receivership statutes and Illinois has no control over or concern with receivership proceedings involving land in Texas. The Illinois receivership omitted the Texas land from the inventory of the Bank's assets (Rec. 13) and the notice of said (Rec. 13). The Illinois receivership estate is neither increased by applying Illinois law to this case and denying Petitioners possession based on that law nor decreased by applying Texas law and granting Petitioners possession based on that law. No governmental interest or process of Illinois is impaired by granting Petitioners possession and making the Texas property readily accessible to the claims of creditors, which Illinois law was designed to accomplish in the first place. Illinois has no power which the Texas Courts can rightfully respect, and, in its receivership proceeding, has taken no action to which the Texas Courts

can properly defer. The application of Illinois law by a voluntary choice which is not based on sound legal or governmental considerations is a capricious choice and denies to Petitioners the due process and equal protection of the applicable Texas law to which they are entitled. *Young v. Masci, 289 U. S. 253, 53 Sup. Ct. 599; Alaska Packers Association v. Industrial Accident Commission 294 U. S. 532, 55 Sup. Ct. 518; Carroll v. Lanza, 349 U. S. 408, 75 Sup. Ct. 804; Currie, the Constitution and the Choice of Law, 26 University of Chicago Law Review, Page 16.*

The question is of such importance as to justify granting the writ.

The possession and use of land is one of the basic and fundamental rights guaranteed to citizens of the United States, and protection of those rights is one of the basic duties of the respective States. The Court of Appeals has taken, or mistaken, this Court's holdings in the corporate dissolution cases as permitting the State Courts to invoke, in their discretion, the statutes and proceedings of other States, though not entitled to full faith and credit, and determine possession of land based on those statutes or proceedings. The rules of law governing possession of land should be as fixed and immovable as the land itself and not left to improvisation or to the expediency of the moment. The relations between the States in this matter are fixed by *Article IV, Section 1.* Unless the Illinois statute is made law in Texas by that section, then it is not law at all; unless

Petitioners are bound by a proceeding sufficient under that section, they are not bound at all. It has been fifty years since this Court in *Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3*, spoke as to the effect of the full faith and credit section in actions which determine possession of land. If the Court speaks again in this case, it will find from its prior decisions that in such cases, the Judges applying State law are bound to apply the Constitution first, the State law second, and have no third choice or option. The judgments below are without basis in *Article IV, Section 1*, and without basis in Texas law, and are not the result of the application of anything which is law, and thus deny Petitioners the possession because of a statute of Illinois which is not law in Texas, and this denies due process of law and equal protection of law to Petitioners.

In applying acts and decrees of other States to land, the Courts of the situs State are to go just so far as full faith and credit requires, and due process forbids those Courts to go any further. The line between the two may not be easy to find, but, when established, it is at once a goal which must be reached and a boundary which must not be crossed. When the Constitution is applied in this way, these Petitioners are entitled to possession of this land in any Court, State or Federal.

WHEREFORE, premises considered, Petitioners pray that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit, and that upon hearing hereof, the judgment of the Court of Appeals and of the District Court be

reversed, and that the cause be remanded to the District Court with instructions to sustain those of plaintiffs' motions as the Court may determine, and Petitioners further pray for such other relief as they may be entitled.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF SERVICE

A copy of this petition for writ of certiorari has been served upon the Respondents by mail by depositing a copy of the same in the United States Post Office with first class postage prepaid, addressed to Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, which is the post office address of said counsel of record for Respondents.

APPENDIX "A"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771.

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLAS,

Appellants,

versus

ROBERT L. FELTINTON, *et al.*,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(September 15, 1961)

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: On the merits the question is whether the district court correctly held that valid sale of real properties located in Texas had been made by a statutory liquidator for an Illinois bank pursuant to a decree of an Illinois state court. Before reaching the merit, a question of the requisite diversity of citizenship to confer federal jurisdiction must first be decided. That question is whether a Receiver appointed by a Texas state court to administer such properties and assets of the Bank as remained at the time of

dissolution was the exclusive representative of the former stockholders of the Bank to the extent that the joinder with the Receiver of three such stockholders, residents of Illinois, would not defeat federal jurisdiction.

The action was commenced by the appellants in the District Court of Pecos County, Texas, and was removed to the district court on the ground of diversity of citizenship.[1] The district court denied the plaintiffs' motion to remand. The plaintiffs were G. C. Nunn, Receiver, a resident of the State of Texas, acting under appointment of the State District Court in a different case; Horace Smith, a Texas resident; and three Illinois residents, Fred Nemerovski, Harry Ballis and Myrtle Ballis. The defendants were four Illinois residents and two New York residents. Thus, on the face of the pleadings residents of Illinois appeared as plaintiffs and as defendants, and there was not that complete diversity of citizenship requisite to federal jurisdiction.[2]

The action concerned nonparticipating royalty interests on the oil, gas and other minerals in and under described lands in Pecos County, Texas, and was in trespass to try title, to quiet title, for cancellation and removal of clouds on title, and for declaratory judgment. The nonparticipating royalty interests in suit had been owned by the West Side Trust & Savings Bank, an Illinois corporation, through whom all parties claim. The plaintiffs claim as successors in interest of the Bank on its dissolution.[3] The defendants claim that all of the assets of the Bank were disposed of be-

[1] 28 U. S. C. A. §1441 (a), §1332.
[2] Strawbridge v. Curtiss, 1806, 7 U. S. 159 (3 Cranch 267); Haynes v. Felder, 5 Cir., 1957, 239 F. 2d 868.
[3] See Peurifoy v. Wiebusch, Tex. 1938, 117 S. W. 2d 773, 775; Vernon's Civil Statutes of Texas, Art. 1388.

fore dissolution, and that through such disposition the defendants acquired title to the royalty interests.

Attached as an exhibit to the petition for removal was a copy of the order appointing Nunn as Receiver and of another order entered shortly after such appointment. The Receiver had been appointed at the instance of the individual parties plaintiff. That part of the order of appointment defining the Receiver's powers and duties provides that G. C. Nunn

> "• • • be, and he is hereby, appointed Receiver of the property, rights, claims, causes of action, both real and personal, situated within the State of Texas, and particularly is appointed Receiver to take charge and control of and manage and control the right, title, interest, claim, demand, cause of action or other interest of the West Side Trust and Savings Bank of Chicago, and which it had at the time of its dissolution, and the interest of the stockholders or former stockholders, officers, agents or directors, or their successors, as well as the depositors and creditors of such bank and which remained vested in such bank at the time of its dissolution, in and to the following described real estate situated in Pecos County, Texas, to-wit:
>
> "• • • • •
>
> "• • • and that after qualifying as Receiver herein, he exercise all of the right, power, custody and control over such assets and property as may be conferred upon receivers by the statutes and rules of procedure of this State and the further Orders of this Honorable Court."

A week after appointing the Receiver, the Texas District Court approved a contract between the Receiver and Horace Smith, one of the plaintiffs, and certain attorneys, containing the following provisions:

> "'In consideration of such agreement and the services performed and to be performed by such attorneys the

undersigned Receiver agrees that he will, out of any property, assets, demands, claims, causes of action or other interests which may be discovered or reduced to possession and title established in the Receiver or the Receivership estate, transfer, assign, grant, sell and convey unto said attorneys an undivided ¼ interest * * *.

"G. C. Nunn, Receiver, in consideration of the obligation herein set out to be performed by Horace Smith agrees that he will, out of any property, assets, demands, claims, causes of action or other interests which may be discovered or reduced to possession and title established in the Receiver or the Receivership estate, transfer, assign, grant, sell, and convey unto said Horace Smith an undivided ¼ interest * * *.

"* * *

"This agreement and any transfer, assignments, convevances, deed or other instrument presumptive hereto shall be binding on all stockholders, depositors, creditors, and other persons having an interest in such property and is assigned, free and clear of all liens, claims and encumbrances with full warranty of title in so far as the Receiver is permitted by law to warrant title.

"Any legal action that may be instituted shall be in the name of the receiver * * *."

The pertinent Texas statutes relating to the appointment, power and authority of the Receiver are Articles 2293 (3), 2297 and 2310, Rev. Civ. Stat. of Texas:

"*Art. 2293. Appointment*

"Receivers may be appointed by any judge of a court of competent jurisdiction of this State, in the following cases:

"* * *

"3. In cases where a corporation is insolvent or in imminent danger of insolvency; or has been dissolved or has forfeited its corporate rights."

"*Art. 2297. Receiver's power*

"The receiver shall have power, under the control of the court, to bring and defend actions in his own name as receiver, to take charge and keep possession of the property, to receive rents, collect, compound for, compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize."

"*Art. 2310. Suit by or against*

"When property within the limits of this State has been placed in the hands of a receiver who has taken charge of such property, such receiver may, in his official capacity, sue or be sued in any court of this State having jurisdiction of the cause of action, without leave of the court appointing him. If judgment is recovered against said receiver, the court shall order said judgment paid out of any funds in the hands of said receiver as such receiver."

The position of the defendants, sustained by the district court, is that the Receiver has capacity to use for title and in so doing to represent shareholders, depositors and creditors of the Bank, and that it is the citizenship of the Receiver, and not that of those he represents, which determines jurisdiction.

The plaintiffs, on the other hand, insist that the appointment of the receiver did not divest the shareholders of title to the property, nor vest it in the Receiver, and that the shareholders have the right to sue for title to the property subject to the Receiver's right of possession.

It has been established from an early date that the joinder of formal or unnecessary parties cannot prevent the removal of an action to a federal court.[4] As the cases just cited show,

[4]Barnery v. Latham, 1880, 103 U. S. 205, 213, 215; Salem Trust Co. v. Manufacturers Finance Co., 1924, 264 U. S. 182, 189; Lee v. Lehigh Valley Coal Co., 1925, 267 U. S. 542, 543.

the right of removal depends upon the case disclosed by the pleadings when the petition for removal is filed, subject to the right of the defendant in its petition to show that parties joined by the plaintiff are not necessary parties. It is also well established "* * * that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc." *New Orleans v. Gaines's, Administrator*, 1891, 138 U. S. 595, 606. See also *Mexican Central Ry. Co. v. Eckman*, 1903, 187 U. S. 429, 433, 434; *Fallat v. Gouzan*, 3 Cir., 1955, 220 F. 2d 325, 326, 327.

The question in this case depends upon the extent of the capacity of the Receiver, under the laws of Texas, to represent the stockholders, including the three Illinois residents who were joined with the Receiver as plaintiffs. The basis and theory upon which they were joined is thus alleged in the complaint:

> "The Plaintiff G. C. Nunn has the right to the possession, control, income, rents and revenue from the above lands and interests in his capacity as receiver under order and appointment of this Honorable Court in Cause No. 2458 pending on the docket of this Court to which reference is made. The Plaintiff Horace Smith is the owner of an undivided interest in the fee simple title to the above lands and interests by purchase and transfer from certain persons who are stockholders, or former stockholders, of the West Side Trust & Savings Bank in Chicago, Illinois, their heirs, successors and assigns. The Plaintiffs Fred Nemerovski, Harry Ballis and Myrtle

Chesapeake & Ohio Ry. v. Cockrell, 1914, 232 U. S. 146, 152; Morris v. E. I. duPont de Nemours & Co., 8 Cir., 1934, 68 F. 2d 788, 791; 45 Am. Jur., Removal of Causes, Sec. 136.

> Ballis were stockholders of the West Side Trust & Savings Bank in Chicago, Illinois, at the time it ceased doing business and at the time of its dissolution and are the owners of undivided interests in the above lands and property by virtue of having been such stockholders. The Plaintiffs Horace Smith, Fred Nemerovski, Harry Ballis and Myrtle Ballis are tenants in common and present this action on behalf of themselves and all of their co-tenants against the Defendants who are not their co-tenants, but who are strangers to the title, for the purpose of recovering for and on behalf of themselves and their co-tenants the entire interest in the above property formerly held for or by West Side Trust & Savings Bank, a dissolved corporation, of Chicago, Illinois."

The plaintiffs rely strongly upon *Abbey v. International & G. N. R. Co.'s Receivers*, 1893, 5 Tex. Civ. App. 264, 23 S. W. 934,[*] wherein it was held that,

> "The receivership did not invst the receivers with the title to the company's property. High Rec. § 302. The court, by means of a receivership, assumed the control and management of its property for the purposes of the receivership, and had power, through appropriate proceedings, to divest the corporation of its title. The case is unlike an assignment made by an insolvent person or corporation, by which the title is expressly conveyed. There exists no such relation between the owner and the receiver which admits of a judgment in respect to the title to property against the latter being res judicata as to the former." (23 S.W. at p. 935.)

That holding was clearly based upon the extent of the authority of the particular receiver under the law and the decree of the court providing for his appointment. Such law and decree do not, however, appear in the brief report of the opinion. Nor does the case hold what this quotation

[*] The plaintiffs rely also upon 36 Tex. Jur. 180 and 26 Tex. Jur. 288, which in turn rely upon the cited case.

out of context might imply. It holds that the owner is not bound by a judgment against a receiver where the suit was brought without leave of the receivership court having possession of the property in question unless the judgment is then pleaded in that court. The part quoted states that the receivership court may then divest the owner's title. The case does not imply either that the receivership court cannot make a binding adjudication of the owner's title, or that it may not empower the receiver alone to obtain such a binding adjudication from another court. Other Texas receivers have been held to be actually vested with legal title to the properties in their possession. *Smith v. Texas & N. O. R. Co.*, 1908, 101 Tex. 405, 108 S. W. 819, 821; *Hovel v. Kaufman*, Comm'n of App. of Tex., 1926, 280 S. W. 185, 187. As was said in *Herf & Frerichs Chemical Co. v. Brewster*, Tex. Civ. App., 1909, 117 S. W. 880, 882:

> "The rights and duties conferred upon receivers of the property an insolvent corporation and trustees in possession of the property of such a corporation under the appointment of a court of bankruptcy are largely the same. The title of the property of the insolvent corporation is vested in the receiver, or the trustee in bankruptcy, in trust for the benefit of the creditors, and it is his right and duty, when the interest of the creditors require, to compel by proper proceedings, the delinquent subscribers to pay the balance due on their unpaid stock, and with the fund thus acquired to discharge, as far as he may, the debts of the corporation. So long as the estate is being administered by the courts, the receiver or the trustee alone has the right to pursue the remedy provided by law for the collection of unpaid stock subscriptions. Commercial Bank v. Warthen, 119 Ga. 990, 47 S. E. 537, and authorities cited."

See also, *Cocke v. Wright*, Tex. Civ. App. 1927, 299 S. W. 446, affirmed 39 S. W. 2d 590; *Cox-Rushing Greer Co. v. Richardson*, Tex. Civ. App. 1925, 277 S. W. 718; *Oatman v. Boone*, Tex. Civ. App. 1922, 244 S. W. 398. The principle to be deduced from the cases is that the capacity and authority of a receiver over the title to the properties in his possession depend upon the statutes, laws and decrees which apply to the particular receivership.

The pertinent statutes and decrees governing the present receivership have already been set forth *in extenso*. From a mere reading of them it clearly appears that Nunn was a general receiver, vested not only with possession but with control of the title and authority to sue, representing, by order of the appointing court, the entire interest claimed by the shareholders and all rights of action in respect to it. We conclude that the three Illinois stockholders were mere formal or unnecessary parties, and that their joinder does not prevent the removal of the action nor defeat federal jurisdiction.

II.

The date of the order appointing Nunn as Receiver was March 3, 1959. The Bank had been dissolved many years theretofore, by judgment of an Illinois court on February 1, 1935, which was repeated in the final judgment of November 30, 1948. The Bank had been organized as a corporation under the banking laws of Illinois in 1905. The mineral royalty interests in controversy were owned by the Bank under reservations made in six deeds executed between the years 1927 and 1933. The Bank itself did not convey the interests in controversy prior to its dissolution. The defendants

deraign title through conveyances made by a statutory liquidator for the Bank pursuant to a decree of an Illinois state court. As has been stated, the plaintiffs claim that title remained in the Bank at its dissolution, and then passed by operation of Texas law to its stockholders.

The Auditor of Public Accounts of the State of Illinois caused an examination to be made of the affairs of the Bank as of the close of business on March 28, 1933. The examination disclosed this Bank's condition to be like that of so many other banks during that period. Its capital had become impaired and the impairment could not be made good. On account of that condition, the Auditor took possession of its assets on December 19, 1933, and retained control until January 12, 1934, at which time the Auditor found and determined that the Bank "cannot be reorganized and that the same should be liqiudated through receivership." The Auditor appointed a receiver and authorized and directed the receiver "to take possession of, and for the purpose of such receivership the title to the books, records and assets of every description of said bank and to collect all debts, dues or claims belonging to it and to conserve the same for the benefit of the creditors of said bank." The Auditor was acting in conformity with the Illinois banking laws. Section 11, Chapter 16½, Smith & Hurd Illinois Statutes provides for the appointment by the Auditor of a receiver under such circumstances, and provides that:

> "Such receiver, under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to the books, records and assets of every description of such bank, and shall proceed to col-

lect all debts, dues and claims belonging to it, and, upon the order of a court of record of the county in which said bank is located, may sell or compound all bad or doubtful debts, and on a like order may sell the real and personal property of such bank, on such terms as the court shall direct."

Three days after he had appointed a receiver pursuant to said statute, the Auditor filed a bill of complaint in the Superior Court of Cook County, Illinois, seeking the instructions and orders of that Court as to the liquidation and dissolution of the Bank. On February 1, 1953, the Court entered an order directing the Receiver to file an inventory of properties of the Bank coming into his possession or to his knowledge, and authorizing the Receiver to file proper petitions to sell real estate or personal property belonging to the Bank, and to complete all acts necessary to its liquidation. In the order the Court found that the Receiver had already taken possession of the title to all of the assets of the Bank of every description, pursuant to the Auditor's order of appointment and under the direction of the Auditor. The Court's order of February 1, 1935 also undertook to terminate the corporate existence of the Bank.[7]

Several successor Receivers were appointed by the Auditor, the last of whom was John W. F. Smith, appointed October 1, 1945. On December 30, 1946, John W. F. Smith as Receiver filed a petition for permission to sell all the remaining assets of the Bank. The petition states that there may have been a number of property interests of which the Receiver had no knowledge and that he asks permission to sell

[7] "G. It is Further Ordered that the said defendant, the West Side Trust and Savings Bank of Chicago, be and it is hereby dissolved and that its corporate existence be and the same is hereby terminated."

all such unknown contingent interests. The petition was granted in every particular by the court, and February 4, 1947 was set as the date of sale. The sale was held and the contingent unknown interests were sold to the United Mercantile Agencies, Louisville, Kentucky. On February 21, 1947, the sale was approved by the court. A search of the records of the receivership by both parties does not reveal that the specific mineral rights here in question were ever sold as a known interest, or excepted from the final sale, leading, by a process of elimination, to the conclusion that these rights were among the unknown contingent interests alluded to by the Receiver in his petition for permission to sell. The order of approval empowered and directed the Receiver "to indorse, transfer, assign, quit claim, set over and deliver" the assets tendered for sale at the auction. In accordance with the order, Smith as Receiver made an assignment of interest to the United Mercantile Agencies on March 17, 1947, intended to cover the unknown contingent interests."

On November 30, 1948, the court entered an order reciting that the Receiver had made lawful, proper, and appropriate disposition of all assets whatsoever belonging to the Bank, and that the affairs of the Bank had been fully liquidated under the direction and supervision of the Auditor, and that

"Assignment of Interest.

"Know All Men By These Presents, That I, John W. F. Smith, Receiver of The West Side Trust and Savings Bank, in consideration of the sum of One and No [illegible] Dollars ($1.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged (sic), do hereby sell, assign, transfer, convey, quit claim, set over and deliver over unto United Mercantile Agencies, its successors and assigns, and to its own proper use and benefit, any and all other choses in action, liens, claims, judgments, rights, powers, privileges, titles, easements or interest in any and all other property, if any, real, personal (sic) or mixed belonging to The West Side Trust and Savings Bank of Chicago, or Receiver thereof, except: * * *."

the Auditor had discharged the Receiver as evidenced by a Certificate of Discharge, of which a copy was attached to the court's order. The court took "judicial cognizance of the discharge" of the Receiver by the Auditor, terminated the jurisdiction of the court with reference to the receivership and again ordered that the Bank be dissolved.[9]

On August 25, 1949, United Mercantile Agencies undertook to transfer the unknown contingency interests to one R. L. Feltinton, defendant and appellee in this suit.[10]

In 1952, Phillips Petroleum, a lessee of some of the rights here involved, traced the title so as to obtain a ratification of its lease. To this end, several additional instruments were made by the parties to the "unknown contingency interests" sales. The first new instrument was an assignment of interest by Smith as Receiver to the United Mercantile Agencies, which specifically conveyed the "oil, gas and other mineral rights reserved by L. H. Heymann, Trustee, in lands acquired by him under deed from Erling C. Martinson recorded in

[9] "It Is Further Ordered, Adjudged and Decreed that the corporate entity of the West Side Trust & Savings Bank, an Illinois Corporation, be, and it is hereby dissolved and the charter of said West Side Trust & Savings Bank, an Illinois corporation, be, and it is hereby declared null and void and of no further force and effect whatsoever."

[10] "General Assignment.

"Know All Men by these Presents, That United Mercantile Agencies, Incorporated, of Louisville, Kentucky, in consideration of Ten Dollars and other good and valuable consideration * * * to it paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto R. L. Felton (sic), of 220 South State Street, Chicago, Illinois, his executors, administrators and assigns, to his and their own proper use and benefit, all of the interest it acquired or could acquire as assignee of the Receiver of the West Side Trust & Savings Bank, under the contingency assignment covering any and all other choses in action, liens, claims and judgments, rights, privileges, titles, easements or interest in any and all other property belonging to West Side Trust & Savings Bank or the Receiver thereof not shown on sale notice."

Book 47, page 474, Pecos County, Texas Deed Records . . ." This instrument was backdated to September 16, 1948, prior to the discharge of Smith as Receiver. A second instrument of assignment, which had been signed over by United Mercantile Agencies in blank in 1949 to R. L. Feltinton for the purpose of inserting the description of any "unknown contingency interests" which he uncovered, was also completed with the above description of mineral rights. These instruments, along with copies of the Illinois Receiver's sale proceedings, but excluding the March 17, 1947 assignment of interest from Smith as Receiver to United Mercantile Agencies (see footnote 8, *supra*), were filed for record in Pecos County, Texas.

In 1958 the appellant Horace Smith made an investigation of the present ownership of the interests here in question. He then bought up 21% of whatever interests the stockholders of the dissolved Bank might still have as a result of the liquidation and dissolution proceedings. In January 1959, he filed suit in Pecos County, Texas, seeking a determination of his interests and the appointment of a receiver for any remaining assets in Texas land of the now dissolved West Side Trust and Savings Bank. On March 3, 1959, G. C. Nunn was appointed Receiver.

At this point, the March 17, 1947 assignment of interest from Smith as Receiver to United Mercantile Agencies was filed for record in Pecos County. In April of 1959 the present suit was begun in the District Court of Pecos County, Texas, and removed by the defendants to the United States District Court for the Western District of Texas.

We have carefully considered each of the criticisms of the title claimed by the defendants through the sale made by the Illinois Receiver. We agree that the mineral royalty interests are "real property" under Texas decisions.[11] We further agree that if the Illinois Receiver derived all of his title and authority from the Illinois court, the plaintiffs might prevail, for, under Texas public policy as defined by its legislature, no court, other than a Texas court, has power to appoint a receiver of property situated in Texas.[12] The Illinois Receiver did not, however, rely simply upon the Illinois court for his title and authority.

The Bank was incorporated under the laws of Illinois. Subsequent to the enactment of Section 11 of the Illinois Banking Act, to which reference has been made, providing for the appointment of a receiver by the Auditor when the capital of the Bank has become impaired and the Auditor has determined that the Bank cannot be reorganized, this Bank's charter was amended to increase its capital stock. The Bank's charter was a contract between the Bank, its shareholders, and the State of Illinois; and the Illinois statutes became a part of that contract. Those statutes provided for the appointment by the Auditor of the receiver as statutory liquidator, and on his appointment, the receiver succeeded to the Bank's

[11] Hager v. Stakes, 116 Tex. 453, 294 S. W. 855 (1927); Sheffield v. Hogg, 124 Tex. 290, 80 S. W. 2d 741 (1935); Japhet v. McRae, 276 S. W. 669 (Com. App., 1925); Caruthers v. Leonard, 254 S. W. 779 (Com. App., 1923).

[12] "When a person resides in this State and a receiver is applied for, or if the property sought to be placed in the hands of a receiver is situated within the limits of this State, no court other than one within the limits of this State, shall have power to appoint any receiver of said property." Art. 2313, 7 Tex. Civ. Stat.

title to its assets of every description.[11] The Texas decisions recognize the distinction between statutory liquidation and equity receivership.[12] That Texas has no policy against transfer of title by the law of the state of incorporation to the liquidator of an insolvent or dissolved corporation is shown by Texas statutes making like provisions for Texas corporations.[13] It is not necessary to decide whether Article IV, Section 1 of the Constitution of the United States and Section 1738 of Title 28, United States Code, require that Texas courts give full faith and credit to the Illinois statute under which title was vested by the Auditor in the Illinois Receiver, for under a very recent decision of the Supreme Court of Texas it would seem clear that, since no established public policy of the State of Texas has been violated, the Texas courts would recognize the title of the Illinois Receiver upon the principles of comity. *McElreath v. McElreath*, *Tex.*, 1961 345 S. W. 2d 722, 725.[14]

The description contained in the March 17, 1947, general assignment of interest by the Illinois Receiver to United Mercantile Agencies (see footnote 8, *supra*) was extremely general. The deposition of John W. F. Smith, the former Illinois Receiver, showed the description covered all of the

[11] Relfe v. Rundle, 1881, 103 U. S. 222; Keatley v. Furey, 1912, 226 U. S. 399; Clark v. Willard, 1934, 292 U. S. 112.

[12] State Board of Insurance v. Betts, Tex., 1958, 308 S. W. 2d 846; Carpenter v. Pink, Tex. 1939, 124 S. W. 2d 981.

[13] See Articles 1388 and 489B, R. C. S. Tex.; Article 21.28 of the Texas Insurance Code, Acts 1951, 52nd Legislature, Ch. 491.

[14] It is important to note that no rights of any Texas creditors of the Bank were asserted in this case. The only Texan shown to have any interest was the plaintiff Horace Smith, who in 1958 bought up supposed interests of the stockholders of the dissolved Bank in anticipation of this suit. Cf. Fischer v. American United L. Ins. Co., 1942, 314 U. S. 549, 555; Clark v. Willard, 1935, 294 U. S. 211, 214, 215.

assets of the Bank not known to the liquidating Receiver, and that he did not know of the royalty interests sued for. In Texas the description in a deed is not void for uncertainty unless, on its face, the description cannot be made certain by extrinsic evidence. 19 Tex. Jur. 2d, Sec. 121, pp. 424, 425. Likewise, the description in the general assignment executed by United Mercantile Agencies, Inc., to R. L. Feltinton, defendant and appellee in this suit (see footnote 10, *supra*), could be made certain by extrinsic evidence. We do not find it necessary to pass upon the validity of the deed made by Smith as Receiver to the United Mercantile Agencies in 1952 and backdated to September 16, 1948. Nor is it necessary for us to rule upon Feltinton's authority to fill in a more specific description in the blank assignment delivered to him by United Mercantile Agencies.

We conclude that all assets of the Bank were disposed of by the Illinois liquidating Receiver, and that the defendants-appellees deraign title through such disposition to the mineral royalty interests in suit. There being no substantial dispute as to the evidentiary facts, the question was properly decided by the district court on motions for summary judgment by denying the plaintiffs' motion and granting the defendants' motion. The judgment is

AFFIRMED.

That Feltinton probably did have such authority, see Glasscock v. Farmer's Royalty Holding Co., 5 Cir., 1945, 152 F.2d 607, 608, 609.

APPENDIX "B"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

ORDER:—

Pursuant to the Motion of Appellants,

IT IS ORDERED that the time for filing the Petition for Rehearing in the above entitled and numbered cause is extended to and including November 1, 1961.

/s/ RICHARD T. RIVES
U. S. Circuit Judge

Dated: October 9, 1961

(ORIGINAL FILED—SEPTEMBER 9, 1961)

APPENDIX "C"

JUDGMENT

Extract from the Minutes of September 15, 1961

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH,
FRED NEMEROVSKI and HARRY BALLIS,

versus

ROBERT L. FELTINTON, *et al.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, G. C. Nunn, Receiver, Horace Smith, Fred Nemerovski and Harry Ballis, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(DECEMBER 12, 1961)

ON PETITION FOR REHEARING

Before HUTCHESON, RIVES and WISDOM, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

Petition for Rehearing Filed 10/30/61
Petition for Rehearing Denied 12/12/61

APPENDIX "D"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18771

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI and HARRY BALLIS,
Appellants,

versus

ROBERT L. FELTINTON, *et al.*,
Appellees.

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this court therein; to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ.

pon the expiration of thirty days from the date of this ; unless the above-mentioned certificate shall be filed the clerk of this court within that time.

ONE AT NEW ORLEANS, LA., this 5th day of Janu- 1962

/s/ JOHN MINOR WISDOM

United States Circuit Judge.

(ORIGINAL FILED—JANUARY 5, 1962)

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No. 690

In the

Supreme Court of the United States

OCTOBER TERM, 1961

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS AND MYRTLE BALLIS,
Petitioners,

v.

R. L. FELTINTON, LYDIA M. FELTINTON, SAMUEL C. LURIE, JOSEPHINE M. LURIE, WILLIAM L. LURIE, INDIVIDUALLY AND AS TRUSTEE, AND RITA M. LURIE,
Respondents.

RESPONDENTS' REPLY BRIEF

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Dallas, Texas,
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HAROLD F. THOMPSON,
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WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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No. 690

In the

Supreme Court of the United States

OCTOBER TERM, 1961

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS AND MYRTLE BALLIS,

Petitioners,

v.

R. L. FELTINTON, LYDIA M. FELTINTON, SAMUEL C. LURIE, JOSEPHINE M. LURIE, WILLIAM L. LURIE, INDIVIDUALLY AND AS TRUSTEE, AND RITA M. LURIE,

Respondents.

RESPONDENTS' REPLY BRIEF

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, R. L. Feltinton et al., hereby submit their Reply Brief in opposition to the Petition for Writ of Certiorari filed herein on January 29, 1962.

OPINION BELOW

The opinion of the United States Court of Appeals (R. 345-363) is reported at *294 F. 2d 450*. The United States

District Court for the Western District of Texas did not render an opinion.

JURISDICTION

The judgment of the United States Court of Appeals (R. 364) was entered September 15, 1961. A petition for rehearing was filed on October 30, 1961 (R. 372) pursuant to an extension of time for such filing granted on October 9, 1961 (R. 371) and the petition was denied on December 12, 1961 (R. 416). The petition for a writ of certiorari was filed on January 29, 1962. The jurisdiction of the Court is invoked under *Subdivision (1), Section 1254, Title 28, United States Code*. Jurisdiction under that statute is subject to *Section 2101, Subsection (c), of Title 28, United States Code* (Appendix, page 27 below). Also, Petitioners invoke *Subdivision (b), Section 1, Rule 19, Supreme Court Rules*.

QUESTIONS PRESENTED

1. Whether Federal jurisdiction on the ground of the diversity of citizenship existing between the plaintiff-Receiver, a resident of Texas, and defendants, residents of Illinois and New York, is defeated by the joinder as plaintiffs of individuals, citizens of Illinois, who are not necessary parties because under the law of Texas, the State where the receiver was appointed and this action was brought, they are represented by the plaintiff, a general receiver, who alone is authorized to prosecute the causes of action alleged in the complaint.

2. Whether a court in Texas may recognize a succession pursuant to the corporate charter, of which the Illinois Banking Act is a part, to the title to Texas realty owned by an insolvent Illinois banking corporation.

THE STATUTES INVOLVED

As to the jurisdiction of the Federal Courts on the basis of diversity of citizenship, the statutes involved are *Sections 1332 and 1441(a) of Title 28, United States Code*, (Appendix, page 27 below), which provide for removal to United States Courts of actions involving controversies between citizens of different states.

As to the decisions of the District Court and the Court of Appeals on the merits, Respondents do not believe that constitutional issues are involved in this case.

STATEMENT UNDER FIRST QUESTION

Horace Smith, of Texas, and Fred Nemerovski and Harry and Myrtle Ballis, of Illinois, procured in 1959 the appointment by a state district court in Texas, in an action to which Respondents are not parties, of G. C. Nunn, a citizen of Texas, as general receiver for the property and causes of action in Texas of a dissolved Illinois state bank and the interests of its stockholders, depositors and creditors in Texas property and causes of action which remained vested in the bank at the time of its dissolution in 1948.

Following his appointment, G. C. Nunn, the general receiver for the bank and of the claims and causes of action of

its shareholders, instituted the present suit in a state district court in Texas. The Receiver was joined by Horace Smith, a purchaser of shareholder's rights, and Fred Nemerovski and Harry and Myrtle Ballis, alleged former stockholders and depositors of the bank. The complaint refers to the 1959 Texas receivership proceeding, the pertinent provisions of which are stated in the opinion of the Court of Appeals *(294 F. 2d at 452)*. The real estate described in the order of appointment includes the nonparticipating royalty which is the subject of this suit. That opinion *(294 F. 2d at 452 and 453)* also quotes the applicable statutes [*Articles 2293(3), 2297* and *2310 R.C.S. of Texas*].

This suit is in trespass to try title and to quiet title and for declaratory judgment, with consequent pleas for cancellation and removal of cloud, for the recovery of certain nonparticipating royalty interests in lands in Pecos County, Texas, which are alleged to have been owned by the bank and to have passed to its shareholders on dissolution of the bank.

This suit was removed to the United States District Court for the Western District of Texas, Pecos Division, on the grounds that diversity of citizenship exists between the Receiver, G. C. Nunn, and all the defendants, who are citizens of Illinois and New York, and that the other parties who join with the Receiver as plaintiffs are mere formal and unnecessary parties whose claims were vested in the Receiver at their own request and whose citizenship should not be considered in determining whether the requisite diversity of citizenship exists. Petitioners filed a motion to remand which was overruled by the district court.

Motions for Summary Judgment were filed by Petitioners and Respondents and the district court overruled Petitioners' Motion, sustained Respondents' Motion and entered judgment for Respondents. The rulings of the district court on the Motion to Remand and the Motions for Summary Judgment were affirmed by the United States Court of Appeals for the Fifth Circuit and rehearing has been denied.

ARGUMENT OF FIRST QUESTION

Diversity of citizenship exists between plaintiff-Nunn, Receiver, and all defendants. (Petition for Writ, p. 5); Petitioners do not question that this receiver has authority to represent all other Petitioners in this case (Petition for Writ, Question 1, p. 3).

As stated by the Court of Appeals, the question relating to the diversity jurisdiction of the Federal Courts depends upon the extent of the capacity of G. C. Nunn, Receiver, under the laws of Texas, to represent the three Illinois residents who were joined with the Receiver as plaintiffs. The proceedings in the state court, in which Nunn was appointed Receiver for the bank and its stockholders, depositors and creditors were referred to in the complaint filed by the Receiver, and the other parties joining with him, against Respondents, which complaint was the basis of this action. An examination of the appointment proceeding, and particularly the order of appointment (R. 39), makes it clear that the appointing court intended to make G. C. Nunn the owner for the purpose of the receivership of all causes of action for the

recovery of the nonparticipating royalty interests involved in this suit and imposed upon him the power and duty to present, on behalf of the bank and its stockholders, depositors and creditors, all such causes of action.

The Texas statutes and the decrees of the appointing court are set forth in the opinion of the Court of Appeals *(294 F. 2d at 452 and 453)*. Also, the many Texas cases relating to the exclusive right of a general receiver to pursue a cause of action placed under his control by the order of the appointing court or by operation of law are discussed by the court in detail.

However, Petitioners have attacked the diversity jurisdiction of the United States Courts in this case on the ground that Smith, Nemerovski and Ballis, who sought the appointment of the Receiver, G. C. Nunn, in the state district court, retained, after his appointment, a joint and direct interest with the Receiver in the alleged causes of action for the recovery of the nonparticipating royalty interests involved in this suit. This contention ignores the terms of the order of appointment of the Receiver, G. C. Nunn, and the statutes and laws of Texas applicable to a general receiver such as Nunn.

Contrary to the contention of Petitioners, the interest of the Illinois plaintiffs in the subject matter of this case, after the appointment of Nunn, Receiver, was not direct nor was it joint with their Receiver. The interest, if any, of the individual plaintiffs, including the Illinois Petitioners, was derivative and contingent only. If Nunn, Receiver, should re-

cover the property from Respondents, the Illinois Petitioners would participate with other shareholders in the division of whatever might remain after administration in receivership. It is the Receiver, and not the shareholder claimants for whose claims the Receiver was appointed, who has authority to sue for property claimed to belong to the shareholders of the bank on dissolution. It is the duty of the Receiver to recover and administer what assets he can; to this end he is authorized by the receivership proceedings and statutes to sue in his own name. "Any legal action that may be instituted shall be in the name of the Receiver." (R. 49; *394 F. 2d at 452.*) This provision includes the present action in which the individual Petitioners have joined without necessity or legal authority.

The Receiver, G. C. Nunn, was authorized and directed to assert the causes of action which he and the individual plaintiffs have asserted in this case. Neither the receivership proceedings or statutes or decisions require the presence or joinder of the shareholders in the suit. The Receiver is given charge and control of the causes of action. The causes of action cannot have two masters. The receivership proceedings do not commit the causes of action to the joint control of the Receiver and those he represents. In the receivership proceedings any causes of action which any shareholder, creditor or depositor might have with respect to the properties involved in this suit were surrendered to the Receiver. The Receiver was empowered and had authority under Texas law and the order of the appointing court to institute suit in his

own name for the recovery of the nonparticipating royalty interests. Although the Illinois Petitioners join in the assertion of the same claims asserted by the Receiver, the complaint shows on its face, when considered in connection with the receivership proceedings referred to in the complaint, that these Petitioners have no direct claim but only a derivative one through the Receiver. Thus on the face of the complaint, the Illinois Petitioners are not necessary to the assertion of any causes of action asserted in the complaint. There is complete diversity of citizenship between all necessary parties.

After appointment of the Receiver, the shareholders had no direct or joint interest in the causes of action. They are represented by the Receiver and their presence as plaintiffs in the case is immaterial. The individual Petitioners are equally bound by the judgment against the Receiver which denied him and those he represents all right and title to the property sued for, whether those individual Petitioners are named in the complaint or not. They are mere formal and unnecessary parties whose citizenship is to be ignored in determining whether the requisite diversity of citizenship exists in this case.

The cases of *Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514 (1881); Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182, 44 S. Ct. 266, 68 L. Ed. 628 (1924)* and *Lee v. Lehigh Valley Coal Co., 267 U. S. 542 (1925)*, which are cited by the Court of Appeals, hold that the joinder of formal or unnecessary parties cannot prevent the removal of an action to a federal court. Statutes and decisions prescribing

or defining Federal diversity jurisdiction do not distinguish between the joinder of unnecessary parties as plaintiff or defendant.

Contrary to the assertions of Petitioners, there is no conflict between the decisions below in this case and *American Fire & Casualty Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 91 L. Ed. 702 (1951)*. The instant case was not removed under § 1441(c) of Title 28, United States Code. The amendment of that statute changing the basis for removal from a "separable controversy" to a "separate and independent claim or cause of action" is immaterial. Respondents have never asserted that a separable controversy or a separate and independent claim or cause of action exists between the Receiver and any of the other Petitioners on the one hand and Respondents on the other. On the contrary, all controversies, claims or causes of action of parties to the receivership action, including the individual Petitioners, for the recovery of the nonparticipating royalty interests involved in this suit on behalf of the dissolved bank or its shareholders, depositors or creditors are vested in the Receiver, G. C. Nunn. No question of representation was involved in *Finn*.

Smith v. Sperling, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957), cited by Petitioners, is not applicable. In *Sperling* a question of representation was involved. However, the pleadings and the nature of the dispute showed that the claimed representative was hostile and antagonistic to the enforcement of the claim of the stockholder it was supposed to represent. Under these circumstances, the claimed representative did not represent the stockholder. No antagonism or

hostility between the Receiver and the individual plaintiffs is presented in this case. The Receiver and the shareholders are antagonistic to Respondents. The Receiver was appointed to recover the realty from Respondents, adverse claimants, on behalf of the shareholders of the dissolved bank, whom the Receiver represents, and to administer the assets, if recovered, for the benefit of those represented. The Receiver has, in accordance with his appointment and the applicable statutes, represented and sued in behalf of the shareholders.

Petitioners also cite *Second National Bank v. New York Silk Mfg. Co., 11 F. 532 (1882)*, which is inapplicable. That case involved an attachment proceeding filed prior to the appointment of the receiver and the receiver did not acquire, therefore, a right to possession and control of the property which was in legal custody at the time of his appointment. Further, the case involved a specific New Jersey statute which provided that even though a receiver was appointed for an insolvent corporation, the corporation could continue to use and exercise its franchises and transact ordinary business in its own name for *four months after the appointment of the receiver*. Such a continuing right is not provided by the Texas law. The Texas cases cited by the Court of Appeals hold that title to the insolvent corporation's property passes by operation of law to the receiver at the time of his appointment.

In *Bates v. New Orleans B.R. & V.R. Co., 16 F. 392 (C.C.N.D.N.Y. 1883)*, cited by Petitioners, the citizenship of certain trustees was ignored for the purpose of determining diversity of citizenship. The opinion is a memorandum deci-

sion and does not reveal the function for which the trustees were appointed. The terms of the trust may have been such as to permit the cestui to sue. *4 Bogert, Trusts and Trustees, Part 1 (1948) 459-464, Sec. 870.* The case states that the trustees' connection with the controversy was "collateral and subsidiary to the main issue". Such is not the situation here. The Receiver, G. C. Nunn, is an active representative of the other plaintiffs, enjoined by Texas law to carry on the suit in their behalf.

In *Banigan v. City of Worcester, 30 F. 392 (C. C. Mass. 1887)*, cited by Petitioners, the trustee's citizenship was ignored because the trust was apparently created for the sole purpose of creating diversity of citizenship. So far as the opinion discloses, it was a dry trust.

None of the cases cited by Petitioners has any bearing on the instant case where the Receiver is vested with all causes of action for the recovery, from persons not parties to the receivership action, of the property in suit, in accordance with Texas statutes and under specific order of the court which appointed him.

STATEMENT UNDER SECOND QUESTION

The property involved in this suit was owned by the West Side Trust and Savings Bank of Chicago, Illinois, an Illinois banking corporation. Section 11 of the Banking Act of Illinois (Appendix, page 27 below) was in effect when the bank's charter was amended (R. 209-213) and at all subsequent times during the existence of the bank, including the bank's final dissolution in 1948. That Section 11 pro-

vides that on a finding of the state Auditor of Public Accounts that the bank should be liquidated, he should appoint a receiver for liquidation who should have title to all of the assets of the bank for purposes of the receivership, with authority to sell the real and personal property of the bank on order of a court of record of the county in which the Bank was located. Such finding was made by the Auditor (R. 189) and successive liquidating receivers appointed in writing by him (R. 11-12). The last liquidating receiver, on orders (R. 214 and 235) of the Superior Court of Cook County, Illinois, a court of record of the county in which the bank was located (R. 182) in an action in chancery to which the bank was a party by personal service on its president and to which the liquidating receiver was a party (R. 203), sold to Respondents' predecessor the property involved in this suit (R. 235). The Superior Court found that all assets of the bank had been disposed of by the Illinois liquidating receiver and ordered dissolution of the bank (R. 268). Petitioners claim that Article IV, Sections 1 and 2, Article VI, and Amendments, Articles X and XIV, Section 2 of the Constitution of the United States prohibit the Court of Appeals, in this case arising in Texas, from giving effect to the provisions of the Illinois Banking Act giving title to the receiver for liquidation. Petitioners contend that the property here in suit was not disposed of before dissolution of the bank, notwithstanding the adverse finding of the Superior Court in a suit to which the bank was a party, but passed to the bank's shareholders on its dissolution.

A full discussion of the facts relating to the liquidation of the bank, disposition of all of its assets, and the sale to Re-

spondents' predecessor in title is contained in Respondents' Motion for Summary Judgment (R. 133-159).

ARGUMENT OF SECOND QUESTION

The Illinois Banking Act became part of the charter of the bank. That charter is a contract. The contract thus provides, voluntarily, that when the State Auditor makes a finding that the bank should be liquidated, the Auditor may appoint a liquidating receiver with title to the assets of every description of the bank. By that provision of the Banking Act the receiver's title extends to property within and without Illinois. *People v. Chicago Lloyds, 391 Ill. 492, 63 N. E. 2d 479 (1945)*, considered with *People ex rel Palmer v. Niehaus, 356 Ill. 104, 190 N. E. 349 (1934)*. *Article 21.28 of the Texas Insurance Code* has a similar provision (Appendix, p. 37 below). The Auditor made a finding that the bank should be liquidated, and by an instrument in writing appointed the liquidating receiver. The receiver succeeded to title to the bank's assets. *Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337 (1881); Keatley v. Furey, 226 U. S. 399, 33 S. Ct. 121 (1921); Clark v. Williard, 292 U. S. 112, 54 S. Ct. 615 (1934)*. The liquidating receiver, with the approval of the local court, as provided in the Banking Act, sold the property in suit to Respondent's predecessor. The Superior Court of Cook County, Illinois, having jurisdiction of the subject matter of the liquidation, personal jurisdiction of the bank through service on its President, and personal jurisdiction of the Auditor and the liquidating receiver, who represented the shareholders, depositors and creditors, [*McIlvaine v. City National Bank and Trust Co., 314 Ill. App.*

496, 42 N. E. 2d 93, 101 (1942), ordered the liquidating receiver to convey the property to Respondent's predecessor, and this was done. The Superior Court found that all of the assets of the bank were disposed of by the liquidating receiver.

Petitioners claim that a recognition in Texas, by comity, of a statute or decision of another state in its application to Texas realty is under the facts of this case an "adoption" by Texas of the foreign law. It was the bank, not Texas or the Court of Appeals, that adopted the Illinois Banking Act. The bank accepted the benefits of that Act, which became part of the bank's charter. The courts below merely applied, against the representative of those claiming under the bank on dissolution, the succession provided by the bank's charter through its inclusion of the Banking Act.

This case does not involve an application of Illinois law by voluntary choice of the district court and the Court of Appeals. The voluntary choice was that of the incorporators and directors of the bank, who chose the benefit of Illinois corporation laws with its attendant provisions for universal succession in event of insolvency to title to all the bank's properties by a receiver appointed by the Illinois Auditor of Public Accounts. This is not a discretionary invocation of statutes and proceedings of another state and application of them as a Texas rule of property contrary to the Texas law for transmission of realty. This is not a case where, without more, a Federal court in Texas applies an Illinois statute to determine succession to title to Texas land when Texas has an exclusive and different law for such succession.

Petitioners' argument assumes that the courts below have applied Illinois law and not Texas law. It is not Illinois law but Texas law which is applied by the Court of Appeals; Texas law, which indirectly gives effect to the Illinois Banking Act because it is part of the charter compact. In applying a Texas rule that succession to corporate title to property in Texas may be provided by the corporate charter, which embraces provisions of the statutes of the state of incorporation as to succession on insolvency, where no public policy of Texas is violated, the Court of Appeals is not thereby applying Illinois law rather than Texas law.

Texas law which permits succession to corporate property to be determined by the corporate charter or to be determined by a statute of the state of incorporation which is part of the corporate charter is applicable alike to domestic and foreign corporations. It is not discriminatory.

An essential element of Petitioners' claim is that Articles 2293-2320 R.C.S., Texas, are exclusive and have not been complied with. Those statutes are not applicable. Those statutes apply to ordinary receivers, such as G. C. Nunn, and not to statutory liquidating receivers such as the liquidating receiver appointed by the Illinois Auditor. Texas recognizes that corporate liquidation may be accomplished through a process other than a receiver appointed under Article 2293, R. C. S. Texas. *State Board of Insurance v. Betts, 158 Tex. 83, 308 S. W. 2d 846 (1958); Pink v. State, 105 S. W. 2d 265 (Texas Civil Appeals, 1937), affirmed in Carpenter v. Pink, 133 Tex. 82, 124 S. W. 2d 981 (1939); Texas Insurance Code,*

Article 21.28 (Appendix, page 37 below); *Article 489b, R. C. S. Texas* (Appendix, page 39 below).

Petitioners cite many cases involving sales of property by common law receivers such as *Barnett v. Poole, 23 Tex. 518 (1859); T. & P. Railway Company v. Gay, 86 Tex. 571, 26 S. W. 599 (1894); Moseby v. Burrow, 52 Tex. 396 (1880)*, and *Evans v. Ropte, 128 Tex. 75, 96 S. W. 2d 973 (1936)*. These cases are inapplicable because Texas recognizes the distinction between common law or equity receivership and statutory liquidation.

Articles 2293-2320, R. C. S. Texas, do not apply to the type of liquidation involved in this case. Article 2313 by its terms applies to court-appointed receivers. It does not apply to the liquidator appointed by the Illinois Auditor. It declares a common law rule.

Petitioners also cite *Humble Oil & Refining Co. v. Blankenburg, 149 Tex. 489, 235 S. W. 2d 891*, and *Courseview, Inc. v. Phillips Petroleum Co., 158 Tex. 397, 312 S. W. 2d 197*, and infer that they express an exclusive Texas rule as to succession to title to Texas realty owned by a corporation. Both of those cases are based on *Purifoy v. Wiebusch, 132 Tex. 36, 117 S. W. 2d 773*, which upon this point is in turn based upon *Article 1388 R. C. S., Texas*, (Appendix below, p. 39). While Article 1388 provides a succession, it is not exclusive and is inapplicable when the corporate charter or the law of the state of incorporation provides a different succession. Thus, in *Shropshire v. Shaw, 121 Tex. 463, 49 S. W. 2d 708*, Article 1388 is held not to be exclusive when applied to a

Texas state bank. The authority conferred under Section 1388 is subordinate to the authority of the State Banking Commission to take over the affairs of the bank for the purpose of administration under the provisions of the Texas Banking Laws whenever he finds it necessary to do so for the protection of the rights of depositors and creditors. Texas recognized in *Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171 (1901)*, that the property of a Louisiana corporation might be liquidated by a Commission appointed in accordance with charter provisions conforming to Louisiana law if the Commission was appointed by written instrument as required by Texas conveyancing statutes. In the present case, an Illinois liquidator was appointed by the State Auditor by such a written instrument. In *Baldwin*, Texas recognized that passage of corporate title may be to statutory liquidators rather than shareholders, and that the type of receivership provided in Articles 2293-2320 R. C. S. Texas, is not the exclusive means of liquidation of a corporation.

There is nothing in the statutes or decisions of Texas which prohibits succession to title to Texas realty by a statutory liquidator for a corporation. There is nothing that requires a corporation to be liquidated by a receiver appointed under Article 2293, R. C. S., Texas rather than a statutory liquidator. There is nothing that requires that corporate property in Texas pass to the shareholders, if the corporate charter or law of the state of incorporation to which the charter is subject provides otherwise.

Petitioners claim that Texas has an exclusive means of passage of corporate title to Texas land which does not in-

clude the means involved in this case. They claim that instead of applying the exclusive Texas means, the Court of Appeals has applied an Illinois statute and proceeding. It is claimed that by applying the Illinois statute and proceeding, instead of the exclusive Texas means, the Court of Appeals denies due process and equal protection of the laws, and abridges the privileges and immunities of citizens.

Articles 1288-1301, R. C. S. Texas, the Texas conveyancing statutes cited by Petitioners, are not exclusive means of passage of title to Texas lands. Fritz, "*The Texas Law of Conveyancing*," *Sections 5 and 6, Supplement to Volume 3, Vernon's Annotated Revised Civil Statutes of Texas; Article 1388, R. C. S. Texas* (Appendix, page 39 below); *Texas Business Corporation Act, Article 5.06 A(4)* (Appendix, page 42 below); *Texas Insurance Code, Article 21.28* (Appendix, page 37 below); *Article 489b, R. C. S. Texas* (Appendix, page 39 below). *Article 1322, R. C. S. Texas* (Appendix, page 41 below) authorizes conveyances on behalf of a corporation but it is not exclusive. *Aransas Pass Harbor Co. v. Manning, 94 Tex. 558, 63 S. W. 627 (1901).*

In the instant case there is no conflict between Texas policy and the Illinois Banking Act and the orders of the Superior Court. Only Illinois has specifically legislated with regard to the succession to title of property of an insolvent Illinois bank. Illinois had power over this corporation, control of its existence and a governmental interest in its dissolution. Texas has no policy denying Illinois the right to grant corporate existence to an Illinois corporation or the right to provide for succession to property belonging to that corporation upon

dissolution. On the contrary, Texas policy with regard to the dissolution of Texas corporations, as expressed in the statutes referred to above and in the opinion of the Court of Appeals, is the same as the policy of Illinois. Thus, under the doctrine of comity, the Texas courts may properly recognize the succession to title by the Illinois liquidator.

No public policy of Texas is violated by recognition of the Illinois liquidation, the title of the liquidating receiver, or the orders and decrees of the Superior Court of Cook County. *McElreath v. McElreath, 345 S. W. 2d 722 (Tex. Sup. 1961)*; *Articles 489b* (Appendix p. 39 below) and *1388* (Appendix p. 39 below) *R. C. S. Texas, Article 21.28, Texas Insurance Code* (Appendix p. 37 below).

Colden v. Alexander, 141 Texas 134, 171 S. W. 2d 383 (1943) and *Teas v. Kimball, 257 F. 2d 817 (5th Cir. 1958)*, cited by Petitioners, do not conflict with the decision of the Court of Appeals in this case. Those cases decline to enforce an oral contract *(Colden)* and a partnership with a married woman *(Teas)* affecting Texas land which are unenforceable under Texas law. In the present case neither the charter contract of the bank nor the decisions of the Superior Court of Cook County, having jurisdiction of the parties and subject matter, are unenforceable in Texas, even though they are pursuant to the Illinois Banking Act and to that extent such act indirectly affects the title to the Texas realty. In the present case the Court of Appeals applies Texas law to determine whether there has been an effective transfer of title. Texas has no policy against succession to corporate title to Texas realty provided by the corporate charter or the law of the state of incorporation.

This is not a case where Illinois, by force of its fiat, provides succession of title to Texas realty contrary to the succession provided by Texas law.

Morris v. Hand, 70 Tex. 481, 8 S. W. 210 (1888); Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3, and other similar cases cited by Petitioners refer only to the well recognized limitation on the power of a court in one state by its own decree directly to divest title to real estate in a foreign state. The cases have no relation to the effect of a foreign decree in personam as res judicata where, as in this case, there is jurisdiction of the person and the general subject matter.

The liquidating receiver did not get his title solely because of the Illinois Banking Act or the decrees or orders of the Superior Court. The bank's charter created a right of property in the liquidator on his appointment by the auditor. This right of property was subject to recognition and enforcement in Texas.

The question here is not whether the law of Texas authorizes Texas courts to adopt the statutes of another state as a rule of decision. It is whether the law of Texas is contrary to the Constitution of the United States when it permits Texas courts to recognize and enforce the contractual rights of the parties by giving effect to the charter of the Illinois bank, when that charter encompasses provisions of the Illinois statute as to succession to title in event of insolvency. This enforcement of contractual rights is not a denial of due process. Since neither the Texas conveyancing nor receivership statutes cited by Petitioners are exclusive or applicable, there is

no denial of due process or equal protection and no abridgme . of privileges and immunities.

Petitioners cite the cases of *Pacific Employers Insurance Company v. Industrial Accident Commission of California, 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939); Young v. Masci, 287 U. S. 253, 53 S. Ct. 599, 72 L. Ed. 1158 (1933); Alaska Packers Association v. Industrial Accident Commission of the State of California, 294 U. S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935);* and *Carroll v. Lanza, 349 U. S. 408, 75 S. Ct. 804, 99 L. Ed. 1183 (1955),* to illustrate an alleged violation of due process and equal protection. All of these cases involve direct conflicts between workmen's compensation legislation of the states involved. They hold a state is not required to give full faith and credit to a statute or decision of a sister state which is contrary to the policy of the forum. None of the cases deal with the doctrine of comity.

Petitioners refer to the case of *Fischer v. American United Life Ins. Co., 314 U. S. 549, 62 S. Ct. 380, 86 L. Ed. 444 (1942),* as the only case involving the voluntary application of the law of another state in determining possession of property, and contend that such voluntary application may only be had with regard to personal property. This contention is not supported by the cases such as *Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171 (1901),* and *McElreath v. McElreath, 345 S. W. 2d 722 (Tex. Sup. 1961).*

The decision of the Court of Appeals was not based solely on the Illinois statutes and proceedings as Petitioners imply. Additional facts in this case are that: Illinois is the state of

incorporation and domicile of the bank; the corporate charter includes the Illinois Banking Act; the bank and the liquidating receiver who represented the shareholders, depositors and creditors were parties to the liquidation proceeding in the Superior Court in which the sale was ordered and confirmed and all assets were found to have been disposed of before dissolution of the bank; in that proceeding the Superior Court had personal jurisdiction of all interested parties and jurisdiction of the subject matter which was the liquidation of the bank; Texas requirements for passage of title to Texas realty were satisfied.

Texas may, without exceeding the limitations of the Constitution of the United States, have a rule of decision, applicable alike to domestic and foreign corporations, that succession to title to corporate property on insolvency shall be governed by the law of the state of incorporation; but it is not necessary in this case to go so far as to hold that the Illinois statute is to be applied as such. It is only necessary here to say that Texas may enforce a charter provision of a foreign corporation for succession to title to Texas land; or that Texas may give effect to findings of the Superior Court of Illinois, having jurisdiction of the parties and of the subject matter, that the realty in suit was duly sold to Respondent's predecessor, and all the bank's assets disposed of by the liquidating receiver before dissolution. *McElreath v. McElreath*, 345 S. W. 2d 722 (Tex. Sup. 1961). The decisions below may be sustained on either ground. Under Texas law a party suing for or asking affirmative relief as to Texas realty must recover if at all, on the strength of his own title.

Adams v. Bowles, 149 Texas 52, 228 S. W. 2d 849 (1950); Ballard v. Carmichael, 17 S. W. 393 (Tex. Sup. 1891).

Illinois had both power over and an interest in the liquidation of the Illinois bank which was the subject matter of the liquidation proceedings in the Superior Court of Cook County, Illinois. Such liquidation was within the subject matter of the pertinent provisions of the Illinois Banking Act. The Superior Court had jurisdiction of that subject matter and personal jurisdiction of the bank, the liquidating receiver; and, through his representation, the shareholders, depositors and creditors. It was not necessary that the Superior Court have territorial jurisdiction of all property owned by the bank. There is not involved here a direct transfer of property by fiat of the Illinois court such as was involved in *Fall v. Eastin, 216 U. S. 1, 30 Sup. Ct. 3*, and similar cases cited by Petitioners. The orders of the Superior Court are in personam. They affect only indirectly the Texas realty.

Since the Superior Court had jurisdiction of the subject matter and personal jurisdiction of all parties, its orders and decrees are entitled to full faith and credit in Texas. However, because of the law of Texas regarding comity, it is not necessary to reach this constitutional point, as the Court of Appeals correctly decided *(294 F. 2d at page 458)*.

Recognition by courts in Texas that the Bank has, by its charter made in Illinois, subjected the bank to certain conditions prescribed by the Illinois Banking Act, does not give to the Illinois Banking Act any extra-territorial effect.

John Hancock Mutual Life Insurance Company v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. Ed. 106 (1936).

In short, it may be said that the Texas law applied in the instant case, which is applicable to domestic and foreign corporations alike, is that provisions of a corporate charter for succession to the title to corporate property, including realty, will be given effect where not contrary to public policy. The corporate charter may provide for succession by adoption of the provisions of the law of the state of incorporation. The question presented is whether such a Texas law is invalid under the Constitution of the United States.

The Illinois Banking Act, although it deals with insolvent banks, is not in the nature of a bankruptcy or insolvency law. It provides no discharge. *Denny v. Bennett, 128 U. S. 489, 9 S. Ct. 134 (1888).* No claims of Texas creditors are shown to be involved here. The passage of title from the bank to the liquidating receiver is comparable to a voluntary, not an involuntary transfer. *Clarke v. Willard, 292 U. S. 112, 54 S. Ct. 615, 78 L. Ed. 1160 (1934); Headnotes 4 and 6.* The distinction is recognized in *Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269 (1890)* and *Security Trust Company v. Dodd, 173 U. S. 624, 19 S. Ct. 545 (1899).*

CONCLUSION

Petitioners have not demonstrated any conflict between the decision below and any decision of this Court or any court of appeals or Texas court. Neither have they shown any violation of their Constitutional rights to due process and equal protection of the laws, or that privileges or

immunities of citizens are abridged. The decision below was clearly correct both as to the capacity of the Receiver, G. C. Nunn, under Texas law, to represent the shareholders joined with him as plaintiffs in the suit and as to disposition of the realty in suit through sale by the Illinois liquidator. Respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above Brief were sent by United States mail, postage prepaid, to attorneys for Petitioners by sending the same to Maurice Bullock, Fort Stockton, Texas, and F. H. Panhill and Boyd Laughlin, P.O. Box 670, Midland, Texas, this day of February, 1962.

APPENDIX

ARTICLE 2101(c), TITLE 28, UNITED STATES CODE

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

ARTICLE 1441(a), TITLE 28, UNITED STATES CODE

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

SMITH-HURD ILLINOIS STATUTES

Chapter 16½—Banks

§ 11. *Minimum capital determined by location — Impairment of capital — Misconduct of business*

(a) Banks and banking associations may be organized under the provisions of this Act, at any place within the State, with minimum capital stock as follows:

1. If not within a city, village or incorporated town, or if in a city, village or incorporated town of twenty-five hundred (2,500) inhabitants or less, of twenty-five thousand

dollars ($25,000) provided no bank exists in such place at the time the application to organize is filed with the Auditor of Public Accounts.

2. If in a city, village or incorporated town of more than twenty-five hundred (2,500) and less than ten thousand. (10,000) inhabitants, of fifty thousand dollars ($50,000.00).

3. If in a city, village or incorporated town of ten thousand (10,000) inhabitants and less than fifty thousand (50,000) inhabitants, of one hundred thousand dollars ($100,000).

4. If in a city, village or incorporated town of fifty thousand (50,000) inhabitants or more, of two hundred thousand dollars ($200,000).

(b). Should the capital stock of any bank organized under this Act become impaired, the Auditor shall give notice to the directors to have the impairment made good by assessment of the stockholders, pro rata, for an amount, if necessary, equal to the par value of the stock held by each, or to reduce the capital stock of such bank, if the reduction should not bring the capital below the provisions of this section, and if any stockholder or stockholders of such bank shall neglect or refuse after thirty days notice to pay the assessment as provided in this section it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction (after twenty days notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located or in a newspaper published nearest thereto) to make good

the deficiency, and the balance, if any shall be returned to such delinquent stockholder or stockholders. If the capital stock of said bank shall remain impaired for sixty days after such notice by the Auditor, or, if it appears from the reports made to the Auditor under this Act, or from any examination made by or on behalf of the Auditor that the conditions of any bank organized under this Act are such that the impairment of the capital stock cannot be made good if in the opinion of the Auditor, it is operating with an insufficient portion of its assets in cash or readily convertible securities, or that the business of any such bank is being conducted in an illegal, fraudulent or unsafe manner, he may, in his discretion, without having taken the steps provided in this section to make good the impaired capital stock, forthwith, for the purpose of reorganization or liquidation through receivership, take possession and control of the banking house, furniture and fixtures, books, records, and assets of every description, of such bank. If the Auditor determines that the bank cannot be reorganized and that the same should be liquidated through receivership he shall appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Auditor, shall take possession of, and for the purpose of the receivership, the title to the books, records and assets of every description of such bank, and shall proceed to collect all debts, dues and claims belonging to it, and, upon the order of a court of record of the county in which said bank is located, may sell or compound all bad or doubtful debts, and on a like order may sell the real and personal property of such bank, on such terms as the court shall direct.

Such receiver shall file with the Auditor of Public Accounts a copy of each report which he makes to the court, together with such other reports and records as the Auditor may require.

Such receiver shall have authority to sue and defend in his own name with respect to the affairs, assets, claims, debts and choses in action of such bank. He shall also have the authority and it shall be his duty, under the direction of the Auditor, to surrender to customers of such banks their private papers and valuables left with said bank for safekeeping upon satisfactory proof of ownership. As soon as can reasonably be done, he shall resign on behalf of said bank, all trusteeships, guardianships, conservatorships, and all appointments as executor and administrator, making in each case a proper accounting on behalf of said bank. He shall have the power and authority to redeem or take down collateral hypothecated by said bank to secure its notes or other evidences of indebtedness whenever the Auditor deems it to the best interest of the creditors of said bank so to do, and to do such other things and take such other steps from time to time under the direction and approval of the Auditor as may reasonably appear to be necessary to conserve the trust estate and secure the best interests of the creditors of said bank.

Such receiver may petition the Circuit Court of the county in which such bank is located or any judge thereof in vacation for authority to borrow money and to pledge the assets of such bank as security therefor. Upon the filing of such petition, such court or judge shall set a date for the hearing of such petition and shall prescribe the form and manner of the

notice to be given the officers, stockholders, creditors or other persons interested in such bank. Upon such hearing any officer, stockholder, creditor or person interested shall have the right to be heard. If the court by order grants such authority then such receiver may borrow money and issue evidences of indebtedness therefor and may secure the payment of such loan by the mortgage, pledge, transfer in trust or hypothecation of any or all of the property and assets of such bank whether real, personal or mixed, superior to any charge thereon for the expenses of liquidation. Such loan may be obtained in such amount upon such terms and conditions and with such provisions for repayment as may be deemed necessary or expedient and may be obtained for the purpose of facilitating liquidation, protecting or preserving the assets, expediting the making of distributions to depositors and other creditors, providing for the expenses of administration and liquidation, aiding in the reopening or reorganization of such bank or its merger or consolidation with another bank, or in the sale of its assets. Such receiver shall be under no personal obligation to repay any such loan and shall have authority to take any and all action necessary or proper to consummate such loan and to provide for the repayment thereof, and may, when required, give bond for the faithful performance of all undertakings in connection therewith. Prior to petitioning the court for authority to make any such loan, such receiver may make application for or negotiate any such loan subject to obtaining an order of the court approving the same.

The Auditor of Public Accounts, shall, upon appointing a receiver, cause notice to be given by advertisement in such

newspaper as he may direct, once each week for twelve consecutive weeks, calling on all persons who may have claims against such bank to present the same to such receiver and to make legal proof thereof and in case the Auditor of Public Accounts, represented by the Attorney General's office has instituted suit or proceedings for the dissolution or winding up of the affairs of such bank in the Circuit Court of the county where the bank is located, such persons or the receiver to whom such persons have presented their claims may present the same to the clerk of such court and the allowance or disallowance of such claims by said court in connection with the said proceedings shall be deemed an adjudication in a court of competent jurisdiction.

Such receiver shall deposit daily all moneys collected by him in any State or National bank selected by the Auditor, who shall require of such depository satisfactory securities or satisfactory surety bond for the safekeeping and prompt payment of the money so deposited. No interest upon money so deposited shall be required of such depository. However, if any interest shall be paid by such depository, it shall accrue to the benefit of the particular trust to which the deposit belongs.

From time to time the Auditor of Public Accounts shall make a ratable dividend of the moneys collected by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such bank are collected, shall make further dividends on all claims previously proven or adjudicated.

The receiver of such bank shall, after the expiration of said twelve weeks, file with the Auditor and with the clerk of such court as may have charge of the liquidation, a correct list of all creditors of said bank, as shown by its books, who have not presented their claims and the amounts of their respective claims after allowing all just credits, deductions and set-offs as shown by the books of said bank. Such claims so filed shall be deemed proven, unless objections are filed thereto by some party or parties interested therein within such time as shall be fixed by the Auditor or by such court as may have charge of the liquidation.

All unclaimed dividends shall be deposited with the Auditor of Public Accounts to be paid out by him when proper claims therefor are presented to the Auditor, and the Auditor shall pay the same out of such sums or funds so deposited with him. After one year from the final dissolution of the bank, the Auditor shall make a pro rata distribution thereof to those claimants who have accepted dividends until such claim or claims are paid in full, and if any of said moneys shall then remain in his hands, the Auditor shall distribute the same pro rata to the stockholders. The Auditor shall deduct, from the funds so deposited with him the expenses of distributing the same.

At the close of the receivership, it shall be the duty of the receiver to turn over to the Auditor all books of account and ledgers of such bank for preservation. All records of such receiverships heretofore and hereafter received by the said

Auditor shall be held by him for the period of two years after the close of the receivership and at the termination of said two year period may then be destroyed.

Whenever any such bank against which proceedings have been instituted, or for which a receiver has been appointed as aforesaid, on account of an alleged impairment of its capital stock or alleged conduct of its business, in an illegal, fraudulent or unsafe manner, or because it is in the opinion of the Auditor operating with an insufficient portion of its assets in cash or readily convertible securities, denies such grounds, it may at any time within ten days, apply to the Circuit Court of Sangamon County, Illinois, to enjoin further proceedings in the premises; and such court, after citing the Auditor of Public Accounts to show cause why further proceedings should not be enjoined, and after the decision of the court or findings of a jury that such grounds do not exist, shall make an order enjoining the Auditor and any receiver acting under his direction, from all further proceedings on account of such alleged grounds.

All expenses of such receivership, including reasonable receiver's, solicitor's and attorney's fees, approved by the Auditor of Public Accounts, shall be paid out of the assets of such bank; and all expenses of any preliminary or other examinations into the condition of any such bank or receivership, and all expenses incident and in connection with the possession and control of any banking house, furniture and fixtures, books, records and assets of every description of such bank by the Auditor for the purpose of reorganization

or liquidation through receivership, shall be paid out of the assets by such bank.

When any banking association, organized under this Act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders provided for by section six (6) of this Act may be enforced by any creditor of such association by bill in equity, in the nature of a creditors bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established.

The Court in which such suit is instituted may appoint a receiver and require of him such bond and security as seems proper for the purpose of collecting, receiving, and disbursing the amounts due from the stockholders on account of their ownership of the stock of said bank. Said receiver shall have authority upon the order of the court appointing him to employ such auditors and assistants as may be necessary to establish and recover the liabilities of the stockholders, and may, with the approval of the court enter into compositions with insolvent stockholders, if any. The costs of such proceedings, including reasonable solicitor's fees for complainants' solicitors, and other necessary expenses of collection, may on the order of court, be paid out of the funds collected by said receiver. The funds so collected, after the payment of the costs and expenses of collection, including solicitors' fees, shall be distributed according to law among the creditors of said bank in such manner as the court shall direct.

Whenever the receiver of any bank, who shall have duly qualified and entered upon the discharge of his trust, shall find it necessary in his opinion to use and employ money of said trust in order to fully protect and benefit his said trust by the purchase or redemption of any property, real or personal in which said trust may have any rights by reason of any bond, mortgage, assignment, or other claim thereto, he may certify the facts together with his opinion as to the value of the property involved and the value of the equity his said trust may have in said property to the Auditor of Public Accounts together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase said property or to redeem the same from a sale if a sale shall have been had, and if such request is granted said receiver may use so much of the money of said trust as the Auditor may have authorized to purchase said property at such sale.

No bill shall be filed or proceedings commenced in any court for the dissolution or for the winding up of the affairs or for the appointment of a receiver for any such banking corporation on the grounds of insolvency or impairment of the capital stock of such banking corporation or upon the grounds that such bank is being conducted in an illegal, fraudulent or unsafe manner, or upon the ground that it is operating with an insufficient portion of its assets in cash or readily convertible securities except in the name and by the authority of the Auditor of Public Accounts, represented by the Attorney General.

At any time, whenever two-thirds in number and amount of the creditors of any such bank or association, after any such receiver shall have been appointed by the Auditor, shall petition the Auditor of Public Accounts for the appointment of any person nominated by them as receiver, who is a reputable person and elector of the county in which such bank or association is located, it shall be the duty of the Auditor to make such appointment, and all the rights and duties of his predecessor shall at once devolve upon such appointee. (Act of 1919, June 23, Laws 1919, p. 224, §11; Laws 1923, p. 158, §1; Laws 1929, p. 174, §1; 1932, Sept. 30, Laws 1932, Fourth Sp. Sess., p. 3, §1; as amended 1937, July 1, Laws 1937, p. 247, §1; 1939, June 19, Laws 1939, p. 290; §1; 1941, July 17, Laws 1941, vol. 1, p. 267, §1.)

§12. Proceedings relating to change of name, business, etc.

* * * * *

And provided, further, that any corporation with banking powers availing itself of or accepting the benefits of, or formed under, this Act, and all corporations with banking powers existing by virtue of any special charter or general law of this State, shall be subject to the provisions and requirements of this Act in every particular, as if organized under this Act.

TEXAS INSURANCE CODE

Texas Insurance Code, Art. 21.28. Liquidation, Rehabilitation, Reorganization or Conservation of Insurers

Sec. 1. Definitions.—For the purposes of this article:

* * * * *

(d) "Liquidator" means the person designated by the Board of Insurance Commissioners as receiver, liquidator, rehabilitator, or conservator of all insurers as defined herein.

• • • • •

Sec. 2. Conduct of Delinquency Proceedings Against Domiciliary Insurers.—Whenever under the law of this State a court of competent jurisdiction finds that a receiver should take charge of the assets of an insurer domiciled in this State, the liquidator designated by the Board of Insurance Commissioners as hereinafter provided for shall be such receiver. The liquidator so appointed receiver shall forthwith take possession of the assets of such insurer and deal with the same in his own name as receiver or in the name of the insurer as the court may direct.

The said receiver and his successors in office shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer, where ever located, as of the date of entry of the order directing possession to be taken. • • •

• • • • •

• • • The liquidator may sell or compound doubtful debts and may sell real or personal property under order of the court, but no such order shall be entered or sale made without notice and hearing.

• • • • •

Acts 1951, 52nd Leg., ch. 491.

ARTICLE 1388, R.C.S., TEXAS

Art. 1388, Revised Civil Statutes, Texas, 1925, 1206-7
Liquidation by officers

Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands. Id.; Acts 1919, 2nd C.S., p. 140.

ARTICLE 489b, R.C.S., TEXAS

Art. 489b, Revised Civil Statutes, Texas, 1925, Federal deposit insurance

* * * * *

Sec. 3. The Federal Deposit Insurance Corporation created by Section eight of the Federal "Banking Act of 1933" (Section 12B of the Federal Reserve Act, as amended) is hereby authorized and empowered to be and act without bond as receiver or liquidator of any banking institution, the deposits in which are to any extent insured by said Corporation, and which shall have been closed on account of inability to meet the demands of its depositors.

The appropriate State authority, having the right to appoint a receiver or liquidator of a banking institution, may in the event of such closing, tender to said Corporation the appointment as receiver or liquidator of such banking institution, and if the Corporation accepts said appointment, the Corporation shall have and possess all powers and privileges provided by the laws of this State with respect to a receiver or liquidator respectively of a banking institution, its depositors and other creditors, and be subject to all the duties of such receiver or liquidator, except in so far as such powers, privileges or duties are in conflict with the provisions of subsection (1) of Section 8 of said "Banking Act of 1933."

* * * * *

Sec. 7. Upon the acceptance of the appointment of receiver or liquidator aforesaid by said Corporation, the possession of and title to all the assets, business and property of such banking institution of every kind and nature shall pass to and vest in said Corporation and without the execution of any instruments of conveyance, assignment, transfer or endorsement.

* * * * *

Acts 1935, 44th Leg., p. 459, ch. 183.

ARTICLES 2297 AND 2310, R.C.S., TEXAS

Art. 2297, R.C.S., Texas (1925) Receiver's power

The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take charge and keep possession of the property, to receive rents, collect, compound for, compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize.
(Acts 1887, p. 120.)

Art. 2310, R.C.S., Texas (1925) Suit by or against

When property within the limits of this State has been placed in the hands of a receiver who has taken charge of such property, such receiver may, in his official capacity, sue or be sued in any court of this State having jurisdiction of the cause of action, without leave of the court appointing him. If judgment is recovered against said receiver, the court shall order said judgment paid out of any funds in the hands of said receiver as such receiver.

ARTICLE 1322, R.C.S., TEXAS

Any corporation may convey lands by deed, sealed with the common seal of the corporation, and signed by the president or vice-president or presiding member or trustee of said corporation, or in common form without seal by its attorney in fact where the instrument constituting such attorney in fact is executed in said manner first mentioned. Such deed, when acknowledged by such officer or attorney in fact to be the act of the corporation, or proved in the manner pre-

scribed for other conveyances of lands, may be recorded in like manner and with the same effect as other deeds. Acts 1905, p. 230; Acts 1939, 46th Leg., p. 133, §1.

TEXAS BUSINESS CORPORATION ACT

Art. 5.06. Effect of Merger or Consolidation of Domestic Corporations

A. When such merger or consolidation of domestic corporations has been effected:

* * * * *

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account; including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed.

* * * * *

Acts 1955, 54th Leg., p. 239, ch. 64.

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No. 690

In the

Supreme Court of the United States

OCTOBER TERM 1961

G. C. NUNN, RECEIVER, HORACE SMITH, FRED NEMEROVSKI, HARRY BALLIS AND MYRTLE BALLIS,
Petitioners,

v.

R. L. FELTINTON, LYDIA M. FELTINTON, SAMUEL C. LURIE, JOSEPHINE M. LURIE, WILLIAM L. LURIE, Individually and as Trustee, and RITA M. LURIE,
Respondents.

PETITION FOR REHEARING

BOYD LAUGHLIN,
Midland, Texas.

F. H. PANNILL,
Midland, Texas.

MAURICE R. BULLOCK,
Fort Stockton, Texas.

GARLAND CASEBIER,
Midland, Texas.

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
Midland, Texas,
Of Counsel.

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Respondents.

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners move the Court to set aside its Order of March 19, 1962, denying the Writ of Certiorari, and in support thereof state:

1.

Petitioners have prepared and submitted an Answer to Respondents' Brief; the Order denying certiorari was entered before this brief was received and it was not considered by the Court. Petitioners submit herewith said answer and request that the same be considered in connection with this

Petition, specifically the statement, or suggestion, by Respondents that the corporation made the Illinois statute a part of its charter, and adopted it as a provision for the succession to its assets, is shown to be not supported by the record. The charter of the Bank is not a part of the record. The Illinois statute in question is not adopted or referred to in the charter amendment increasing the capital stock. The statute in question must be held effective or ineffective of its own force as a statute and not as the act of the corporation.

2.

The Court of Appeals has affirmed a judgment denying Petitioners relief in a suit to recover the title and possession of an interest in land located in Texas and has cited in support of that decision the terms of an Illinois statute applicable to Illinois State Banks.

A holding that the statutes and laws of Texas are not exclusive in such cases but that the statutes of other States may be referred to and made the basis for a decision as to land located in Texas, is in clear and direct conflict with the numerous cases from this Court denying extraterritorial effect to State statutes for this purpose. On this showing, the writ should have been granted. But the writ has been denied. The denial of the writ cannot be taken as meaning that this Court has turned its back on 150 years of judicial precedent and this Court thereby has overruled the long line of cases holding that the statutes and laws of a State do not have, and cannot be given, extraterritorial effect as to the title

to and possession of interests in land in another State. If this Court had meant to do that, it would have said so, and it has not so stated.

So the decision is not the result of the direct application of an Illinois statute to land located in Texas; the decision may be based on the personal capacity of the receiver, successor, or liquidating official, and his personal relationship to the corporation as a legal entity.

In *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337 (1881), this Court held that the Missouri Superintendent of Insurance in winding up the affairs of a Missouri corporation could, as a matter of right under the full faith and credit clause, appear in and defend a suit in Louisiana against the dissolved corporation. For this purpose and to this extent, the personal capacity of the receiver or successor, and his personal relationship to the corporation, has been established by this Court. It has been sustained again in *Clarke v. Williard*, 292 U. S. 112, 54 S. Ct. 615, but on a second appeal of this case, *Clarke v. Williard*, 294 U. S. 211, 55 S. Ct. 396, it was held that as to creditors claiming under attachments in another State, the receiver or successor could not impose the rule of distribution provided by the statute where the corporation was organized.

In *Fisher v. American United Life Insurance Company*, 314 U. S. 549, 62 S. Ct. 380, this Court again sustained the right and power of the receiver or successor to appear as a

party in the Courts of other States but held that he did not have the right to possession as against a receiver acting in the State where the property was located. In *Morris v. Jones*, 329 U. S. 545, 67 S. Ct. 451, the right of the receiver or successor to appear in the Courts of other States was recognized but this Court denied that he had the right to impose in those Courts the procedural restrictions provided in law of the corporation's domicile.

If there is to be deduced from these decisions a principle that the State which creates a corporation may, upon dissolution or insolvency, displace the officers, agents, and representatives of that corporation and substitute other agents or representatives selected by the State, so that their acts thereafter are the acts of the corporation through these representatives, then the facts in this case do not call for the application of such a principle. The administrative proceedings and the judicial proceedings in Illinois do not, by their terms, purport to remove the representative capacity of any person then acting nor to confer such capacity on a receiver, successor or liquidating official. Neither the corporation nor its officers were at any time confronted with that proposition, and, hence, at no time were they accorded notice of that proposition and an opportunity to be heard in opposition to it. For Illinois to sequester the representative powers of the corporate officials and confer them on others without notice that it proposed to do so, or had done so,

simply means that the stockholders' vested right to select the corporate representatives has been taken away without notice and without an opportunity to be heard on that specific issue, and Petitioners submit that this is a denial of due process.

For the reasons stated, Petitioners pray that the Order of March 19, 1962 be set aside, and that the writ be granted.

Respectfully submitted.

BOYD LAUGHLIN,
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F. H. PANNELL,
Midland, Texas.

MAURICE R. BULLOCK,
Fort Stockton, Texas.

GARLAND CASEBIER,
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STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
Midland, Texas.
Of Counsel.

CERTIFICATE

The undersigned certifies that the above is not filed for delay but that intervening factors which are deemed sufficient to justify the filing of the Petition for Rehearing are—

(a) The fact that Petitioners' answering brief was not before the Court when certiorari was denied; and

(b) The denial of the writ without notation or opinion shows that this Court is not holding that an Illinois statute by its own force is or can be made a condition on the ownership of land in Texas.

A copy of the within and foregoing Petition for Rehearing has been furnished opposing counsel by depositing same in the United States Post Office with first class postage prepaid, addressed to Mr. William D. Neary, Thompson, Knight, Wright & Simmons, 2300 Republic National Bank Building, Dallas, Texas, which is the post office address of said counsel of record for Respondents, this day of March, 1962.

F. H. PANNILL